Supreme Court, U.S.
FILED

031231 FEB 24 2004

OFFICE OF THE CLERK

In the
Supreme Court of the United States
October Term, 2004

CELENA VENTURELLI,
Petitioner,

v.

ARC COMMUNITY SERVICES, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

T. Christopher Kelly
Counsel of record

Kelly & Habermehl, S.C.
145 W. Wilson Street
Madison, Wisconsin 53703
Tel. (608) 255-9491

QUESTIONS PRESENTED

1. Should evidence of biased comments about the value of pregnant women as employees defeat summary judgment for an employer in a pregnancy discrimination case when the comments were made: (i) to a job applicant during a discussion of the job, and (ii) by a supervisor who oversees the job and who participated in discussions about the hiring decision?

2. Must a federal court deciding a summary judgment motion in a Title VII case ask whether the totality of the evidence, both direct and indirect, would allow a jury to find that the employer acted with discriminatory intent?

3. To make a prima facie case of pregnancy discrimination, must a pregnant woman prove that: (i) she wasn't hired because of her pregnancy, and (ii) she complained to the employer about the discrimination?

4. Is the decision to delay hiring a pregnant woman until she is no longer pregnant prohibited by Title VII?

PARTIES TO THE PROCEEDING

All parties to the proceeding are listed in the caption. The petitioner is not a corporation.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
PETITION FOR A WRIT OF CERTIORARI	1
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	1
STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	7
I. EVIDENCE OF BIASED COMMENTS ABOUT THE VALUE OF PREGNANT WOMEN AS EMPLOYEES SHOULD DEFEAT SUMMARY JUDGMENT FOR AN EMPLOYER IN A PREGNANCY DISCRIMINATION CLAIM WHEN THE COMMENTS ARE MADE: (i) TO A JOB APPLICANT DURING A DISCUSSION OF THE JOB, AND (ii) BY A SUPERVISOR WHO OVERSEES THE JOB AND WHO PARTICIPATES IN DISCUSSIONS ABOUT EMPLOYMENT DECISIONS.	9
A. Position in the company	12
B. The "influence" test	13
C. The "agency" test	15
D. The "atmosphere" test	16
E. The need for Supreme Court clarification	17

II. A FEDERAL COURT DECIDING A SUMMARY JUDGMENT MOTION IN A TITLE VII CASE MUST ASK WHETHER THE TOTALITY OF THE EVIDENCE, BOTH DIRECT AND INDIRECT, WOULD ALLOW A JURY TO FIND THAT THE EMPLOYER ACTED WITH DISCRIMINATORY INTENT. 19

III. TO MAKE A PRIMA FACIE CASE OF PREGNANCY DISCRIMINATION, A PREGNANT WOMAN NEED NOT PROVE THAT SHE WASN'T HIRED BECAUSE OF HER PREGNANCY, AND NEED NOT COMPLAIN TO THE EMPLOYER ABOUT DISCRIMI-NATION. 24

IV. THE DECISION TO DELAY HIRING A PREGNANT WOMAN UNTIL AFTER SHE IS NO LONGER PREGNANT IS PROHIBITED BY TITLE VII. 27

CONCLUSION 29

TABLE OF AUTHORITIES

Page

CASES

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) 16

Atchley v. Nordam Group, Inc., 180 F.3d 1143 (10th Cir. 1999) 27

Bazemore v. Friday, 478 U.S. 385 (1986) 20

Bickerstaff v. Vassar College, 196 F.3d 435 (2d Cir. 1999) 13

Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998) 26

Chuang v. University of California Davis, 225 F.3d 1115 (9th Cir. 2000) 24

Conway v. Electro Switch Corp., 825 F.2d 593 (1st Cir. 1987) 16

EEOC v. Horizon Healthcare Corp., 220 F.3d 1184 n. 12 (10th Cir. 2000) 13

Ercegovich v. Goodyear Tire Rubber Co., 154 F3d 344 (6th Cir. 1998) 13,16

Evans v. City of Bishop, 238 F.3d 586 (5th Cir. 2000) 12

Gleklen v. Democratic Congressional Campaign Committee, Inc., 199 F.3d 1365 (D.C. Cir. 2000) 27

Hunt v. City of Markham, 219 F.3d 649 (7th Cir. 2000) 14

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) 19,24-26

Mohr v. Dustrol, Inc., 306 F.3d 636 (8th Cir. 2002) 13

Morse v. Southern Union Co., 174 F.3d 917 (8th Cir.), *cert. dismissed*, 527 U.S. 1059 (1999) 12

Oxman v. WLS-TV, 846 F.2d 448 (7th Cir. 1988) 15

Pivirotto v. Innovative Systems, Inc., 191 F.3d 344 (3d Cir. 1999)..... 14

Radue v. Kimberly-Clark Corp., 219 F.3d 612 (7th Cir. 2000) 19

Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133 (2000) 11,12,20,26

Rubinstein v. Administrators of Tulane Educational Fund, 218 F.3d 392 (5th Cir. 2000) 14

Santiago-Ramos v. Centennial P.R. Wireless Corp., 217 F.3d 46 (1st Cir. 2000) 13

Shager v. Upjohn Co., 913 F.2d 398 (7th Cir. 1990) 8

Shorter v. ICG Holdings, Inc., 188 F.3d 1204 (10th Cir. 1999) 20

Swanson v. Leggett & Plat, Inc., 154 F.3d 730 (7th Cir. 1998) 12,17

Trans World Airlines, Inc. v. Thurston, 469 F.3d 111 (1985) 19

Venturelli v. ARC Community Services, Inc., No 02-2294, slip op. (7th Cir. Nov. 26, 2003) 3,4,11,12,15,17,19,21,23,25,26

OTHER AUTHORITIES

29 C.F.R. § 1604.10(a) (2001) 28

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1331 2

42 U.S.C. § 2000e(k) 4,9

42 U.S.C. § 2000e-2 9

42 U.S.C. § 2000e-2(m) 9

3 William Blackstone, *Commentaries* *380 7

Fed. R. Civ. P. 56(c) 25

Galanter, The Vanishing Trial: An *Examination of Trials and Related Matters in Federal and State Courts* (Dec. 2003) (preliminary version of unpublished study available at http://www.abanet.org/litigation/taskforces/cji/nosearches/glanter.pdf.) 8

Wis. Stat. § 632.746(2)(b) 23

Appendix

Appendix A – Seventh Circuit Decision of Resubmission – 11/26/03 1a

Appendix B – District Court's Decision on Summary Judgment – 5/2/02 20a

Appendix C – Statutes Involved 37a

PETITION FOR A WRIT OF CERTIORARI

Petitioner Celena Venturelli respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The district court's opinion granting summary judgment is unpublished. It appears in Appendix B to this petition. The court of appeals' initial opinion was reported at 336 F.3d 606, but was withdrawn. Its subsequent opinion (per Manion, J., joined by Easterbrook, J., over the dissent of Evans, J.) is published at 350 F.3d 592, and appears in Appendix A to this petition.

STATEMENT OF JURISDICTION

The court of appeals entered the decision appealed from on November 26, 2003 after withdrawing an earlier opinion. No rehearing of the November 26, 2003 decision was requested and time limits for petitioning for a writ of certiorari have not been extended. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions appear in Appendix C.

STATEMENT OF THE CASE

Procedural History

Celena Venturelli brought an action in state court against ARC Community Services, Inc. ("ARC") seeking redress under the Pregnancy Discrimination Act ("PDA"), 42 U.S.C. § 2000e(k), for ARC's failure to hire her while she was pregnant. ARC removed the action to federal court, which had jurisdiction pursuant to 28 U.S.C. § 1331.

The district court granted summary judgment for ARC and entered judgment dismissing Venturelli's case. (Dkt. 34, 35) The district court's decision rested on two prongs. First, the district court concluded that "the most that can be inferred from the record before the Court is that ARC did not hire Venturelli while she happened to be pregnant because ARC did not think that Venturelli would return to work after she gave birth and recovered from her pregnancy." (Dkt. 34: 10) Yet the court did not find — and there is no evidence to support a finding — that ARC based its belief on facts rather than stereotyped assumptions about the willingness of women to return to the workforce after giving birth to a child.[1]

---

[1] Venturelli never told anyone at ARC that she was unwilling to start the position as an ARC employee during her pregnancy. (Dkt. 32: ¶ 6) In fact, ARC's controller, Mike Collins, admitted that he asked Venturelli whether she was going to stay at home after having her baby, and Venturelli said "no." (Collins dep. at 82)

Second, the district court held that it does not violate the PDA to condition a job offer upon the termination of a woman's pregnancy. The district court stated that the PDA does not entitle women to special treatment, and then concluded that delaying an employment opportunity, solely because of pregnancy, does not violate the PDA because a job applicant is not entitled to choose when she will start the job.[2] (Dkt. 34: 13) However, there is no suggestion in the record that the job was unavailable until after Venturelli's pregnancy ended.[3]

Venturelli appealed the district court's decision. In its initial decision, the court of appeals agreed with the district court that "an employer may, without violating the PDA, terminate or not hire a woman because it does 'not expect her to work after her maternity leave' ends." *Venturelli v. ARC Community*

---

[2] The district court also suggested that Venturelli suffered no "adverse" employment action because the job was not denied but merely delayed until after her pregnancy ended. (Dkt. 34 at 13) Apart from the court's mistaken assumption that Venturelli was actually offered a job that would start after her pregnancy ended (Venturelli's affidavit plainly states that she was never offered a job at all, dkt. 32: ¶¶ 1-3), it cannot be said that delaying employment is not "adverse." Even if it were true that the job was delayed but not denied, Venturelli lost the benefit of a salary and ARC's benefit package for a significant period of time due to the delay, and thus experienced an adverse employment action.

[3] Rather, ARC's executive director wanted to fill the position "as soon as possible." (Dkt. 10, Kinsey dep. at 8)

Services, Inc., No. 02-2294, slip op. at 10 (7th Cir. July 16, 2003) (citation omitted). Moreover, the court held that nothing in the law requires an employer to corroborate its expectation that pregnant women will not return to the workforce. *Id.* at 10-11. As Judge Evans pointed out in dissent, ARC "never worried that Venturelli would be physically unable to return to work, just that she would be unwilling to do so," and not because of "anything Venturelli said, but from general notions about pregnant women and new mothers." *Id.* at 20 (Evans, J., dissenting). Judge Evans noted that the PDA was enacted specifically to prohibit basing employment decisions on stereotypes about the behavior of pregnant women. *Id.*

Venturelli petitioned the court of appeals for rehearing and for rehearing *en banc*, pointing out that the court's decision permitted an employer to fire an employee the instant the employee disclosed her pregnancy, simply because the employer subscribed to the unsupported belief that women who become pregnant are unlikely to return to the workforce after giving birth. Venturelli's petition argued that the decision was unfaithful to the text of the PDA, for it permits employers to decline to hire women "on the basis of pregnancy," 42 U.S.C. § 2000e(k).

The court of appeals then withdrew its original panel decision and substituted a new panel decision, again over Judge Evans' dissent. *Venturelli v. ARC Community Services, Inc.*, No. 02-2294, slip op. (7th Cir. Nov. 26, 2003). Venturelli petitions for a writ of certiorari to review that decision.

Facts

While Celena Venturelli was pregnant, she began working as a temporary employee ("temp") assigned to ARC Community Services, Inc. ("ARC"). (Dkt. 10, Venturelli dep. at 7-9, 22) The executive director (Kinsey), her assistant (Baldwin), and the controller (Collins) of ARC were all pleased with Venturelli's job performance as a temp. (Dkt. 10, Collins dep. at 52, 55-56; Kinsey dep. at 12, 51-52; Baldwin dep. at 25, 29) When ARC decided to hire an employee for the administrative assistant position that Venturelli was filling as a temp, Venturelli told Collins that she was interested in the position. (Dkt. 10, Venturelli dep. at 30) Collins later asked Venturelli whether she was still interested in the job. When Venturelli said she was, Collins told her "We want to wait" because "We want to see how this pregnancy thing turns out." Collins said "I know how you women are. Once you have that baby, you're not going to want to return." (*Id.* at 33)

Soon after Collins had that conversation with Venturelli, Kinsey had a meeting with Collins and Baldwin. During that meeting, Kinsey instructed Collins to tell Venturelli that she would have a job to come back to but that Venturelli shouldn't "rush it." Kinsey did not authorize Collins to offer Venturelli a job while Venturelli was still pregnant; she only authorized him to discuss a job offer that would allow Venturelli to begin her employment after she delivered her baby. (Dkt. 10, Collins dep. at 74-78)

After the meeting, Collins called Venturelli into his office and told her he didn't want to keep her in the lurch about the

position and that "ARC had decided to wait until after the pregnancy, after [she] had the baby," to hire her. Collins went on to say: "We want to see how this pregnancy thing turns out with you. We know how you women are. Once you hold that baby, you're not going to want to come back to work." (Dkt. 10, Venturelli dep. at 44-45)

On February 1, 2000, Baldwin told Venturelli that she would like to offer her the administrative assistant position but that it wouldn't be to her advantage to take it even if ARC hired her because Venturelli would not be eligible for group health insurance benefits since her pregnancy would be viewed as a preexisting condition. Baldwin told Venturelli that she wasn't losing anything because she wasn't eligible for benefits, so ARC was going to wait until after she had her baby. Baldwin told Venturelli that she would like to have Venturelli for the job, and after she delivered her baby she would be considered for the job. (Dkt. 10, Venturelli dep. at 52-53)

No person at ARC ever extended a job offer to Venturelli. Instead, Collins and Baldwin indicated that ARC might be willing to hold open the job and to continue to fill it with temps until after Venturelli had her baby, and that ARC might then be willing to hire her as an ARC employee. (Dkt. 32: ¶¶ 1, 2) If Venturelli had been offered a position that would have allowed her to begin as an ARC employee during her pregnancy, she would have accepted it. However, she was never offered such a position. (Dkt. 32: ¶ 3) Venturelli never told anyone at ARC that she was unwilling to start the position as an ARC employee during her pregnancy. (Dkt. 32: ¶ 6) The position was eventually filled with a

woman who was not pregnant. (Dkt. 10, Schleif dep. at 13, 26)

REASONS FOR GRANTING THE WRIT

The petition should be granted to resolve the conflicting views of the law that divide different panels in the Seventh Circuit and that divide the circuits generally when deciding whether to grant summary judgment against plaintiffs who seek to prove they were the victims of employment discrimination. The conflicts are discussed in more detail below. In addition, the Supreme Court should grant this petition to discourage lower courts from granting summary judgment for defendants in cases where the plaintiff is plainly entitled to a jury trial.

The Seventh Amendment to the United States Constitution embodies the value that our country places on the right to trial by jury. The authors of that amendment drew upon the teachings of Blackstone, who wrote that allowing a tribunal to decide factual disputes "without the intervention of a jury ... is a step towards establishing aristocracy, the most oppressive of absolute governments." 3 William Blackstone, *Commentaries* *380.

Despite the importance of a jury trial, cases in certain areas of the law, none more so than those alleging employment discrimination, are increasingly being taken from juries and decided on summary judgment. In a recent study, University of Wisconsin Professor Marc Galanter found that the number of civil jury trials has decreased dramatically over the last forty years, despite an increase in the number of filings. The percentage of civil cases reaching trial has

fallen from 11 percent in 1962 to 1.8 percent in 2002. Civil case filings increased by a factor of five over that period, but the raw number of jury trials fell by 20 percent. Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts* (Dec. 2003) (preliminary version of unpublished study available at <http://www.abanet.org/litigation/taskforces/cji/nosearches/galanter.pdf>).

The trend to deprive plaintiffs of jury trials results in part from a disturbing willingness to usurp the role of juries. As Judge Posner wrote in *Shager v. Upjohn Co.*, 913 F.2d 398, 403 (7th Cir. 1990), appellate courts are "reluctant to reverse a grant of summary judgment merely because a rational fact finder *could* return a verdict for the non-moving party" if the appellate court doesn't think the plaintiff has a good case. The attitude that makes judges reluctant to grant jury trials when the judge thinks a plaintiff should probably lose erodes the plaintiff's right to a jury trial.

That attitude appears to be prevalent in Venturelli's case. Having first concluded that it isn't pregnancy discrimination to base employment decisions upon unfounded stereotypes about the way pregnant women behave in the workforce, and having withdrawn that opinion for obvious reasons, the court of appeals substituted an opinion that minimizes the evidentiary value of negative comments about pregnant women made by a member of the employer's management team who was also the woman's supervisor, compartmentalizes the evidence without ever viewing it in its totality, changes the law by requiring the plaintiff to prove the

employer's discriminatory intent as part of her prima facie case, and essentially holds that is not pregnancy discrimination to wait until a pregnant woman is no longer pregnant before offering her a job, so long as the employer consistently refuses to hire pregnant women during their pregnancies.

The court of appeals' decision makes it virtually impossible for a pregnant woman to ever win a PDA case in the Seventh Circuit. Because the court's rationale conflicts with controlling Supreme Court decisions, and creates conflicts with the law in other circuits, the Supreme Court should accept this case to make clear that women who have strong evidence of pregnancy discrimination are entitled to a jury trial.

I. Evidence of Biased Comments About the Value of Pregnant Women as Employees Should Defeat Summary Judgment For an Employer in a Pregnancy Discrimination Case When The Comments Are Made: (i) to a Job Applicant During a Discussion of the Job, and (ii) By a Supervisor Who Oversees the Job and Who Participated in Discussions About the Hiring Decision

The Pregnancy Discrimination Act ("PDA") prohibits an employer from refusing to hire an individual "because of or on the basis of pregnancy, childbirth, or related medical conditions." 42 U.S.C. § 2000e(k); 42 U.S.C. § 2000e-2. It is therefore illegal under Title VII, as amended by the PDA, for pregnancy to be a "motivating factor" for an employment decision. 42 U.S.C. § 2000e-2(m).

Michael Collins, ARC's controller, testified that his position with ARC is essentially that of Chief Financial Officer. (Dkt. 10, Collins dep. at 10) Together with ARC's executive director and assistant executive director, Collins is part of ARC's management team. (*Id.* at 12-13) He discussed the possibility hiring Celena Venturelli as an ARC employee with ARC's executive director, Karen Kinsey, who instructed him to discuss a job offer with Venturelli. Kinsey authorized him only to discuss an offer that would allow Venturelli to begin her employment after she delivered her baby. (*Id.* at 76-77) Venturelli was working at ARC as a temp, and Collins was her immediate supervisor. (Dkt. 10, Venturelli dep. at 23)

Venturelli was pregnant during her temporary assignment with ARC. While discussing with Venturelli the possibility of being hired as ARC's own employee, Collins repeatedly said "I know how you women are. Once you have that baby, you're not going to want to return" and "We know how you women get once you have that baby." It was for that reason, according to Collins, that ARC would not hire Venturelli right away: Collins told Venturelli that "We want to wait" because "We want to see how this pregnancy thing turns out." (Dkt. 10, Venturelli dep. at 33-35)

During Collins' second meeting with Venturelli (following Collins' meeting with Kinsey and Baldwin), Collins told Venturelli that "ARC had decided to wait until after the pregnancy, after [she] had the baby" before hiring her. He went on to say that "We want to see how this pregnancy thing turns out" because "[o]nce you hold that baby, you're not

going to want to come back to work." (Dkt. 10, Venturelli dep. at 44-45)

The court of appeals held that Collins' remarks were not proof of ARC's discriminatory intent because Collins was not a decisionmaker; that is, he did not personally make the decision whether or not to hire Venturelli.[4] *Venturelli v. ARC Community Services, Inc.*, No. 02-2294, slip op. at 9-10 (7th Cir. Nov. 26, 2003). Federal courts have charted different and conflicting courses in deciding whether discriminatory statements made by a supervisor should be attributed to the employer. The Supreme Court touched on the question in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000). Reversing a judgment for the employer entered pursuant to Fed. R. Civ. P. 50, the Court ruled that the district court should not have ignored evidence that the person who made age-biased statements about the employee played a role in the decision to fire the employee — including evidence that the person who made the biased remarks was married to the person who made the decision to fire the employee. 530 U.S. at 152-53. However, *Reeves* did not directly address the correct legal test for deciding when biased remarks made by a supervisor should be attributed to the employer. In the absence of clear direction, the lower courts have applied a variety of tests, all of which the court of appeals silently rejected in Venturelli's case.

---

[4] ARC did not argue on appeal that Collins was not a decisionmaker, and the court of appeals' first (later withdrawn) decision did not address the question.

A. Position in the company

The court of appeals acknowledged that Venturelli presented evi-dence that Collins, "as comptroller, ... was part of the ARC management team, that he regularly consulted with Kinsey and Baldwin, and that Kinsey often asked for his input into management decisions." *Venturelli,* slip op. at 9. This evidence did not satisfy the court of appeals that Collins' statements should be attributed to ARC as proof of ARC's discriminatory intent. The Seventh Circuit has followed this rule in other cases. *See, e.g., Swanson v. Leggett & Platt, Inc.,* 154 F.3d 730,733 (7th Cir. 1998).

Other courts, particularly in light of *Reeves,* have recognized that some corporate actors are so highly placed in an organization that a jury could conclude they speak on the organization's behalf. For instance, in *Evans v. City of Bishop,* 238 F.3d 586, 591-92 (5th Cir. 2000), a case that the Fifth Circuit reconsidered in light of *Reeves,* the court held that racially biased remarks by a City Council member were relevant evidence of race discrimination, even though they could not be directly linked to the Mayor's decision (which the Council approved) to fire an employee. Similarly, in *Morse v. Southern Union Co.,* 174 F.3d 917, 920-23 (8th Cir.), *cert. dismissed,* 527 U.S. 1059 (1999), the court held that age-biased remarks made by the company's president were direct evidence of discrimination against a manager, even though the president was not the decisionmaker regarding the manager's discharge.

B. The "influence" test.

Some lower courts have permitted juries to decide whether the discriminatory comments were made by "those in a position to influence the decisionmaker." *Santiago-Ramos v. Centennial P.R. Wireless Corp.*, 217 F.3d 46, 55 (1st Cir. 2000). Under this rule, biased remarks are probative of discriminatory intent if they are made by a person who took part in the decisionmaking process, or who otherwise tainted the decisionmaking process with his or her discriminatory attitudes. *See, e.g., Mohr v. Dustrol, Inc.*, 306 F.3d 636, 641-42 (8th Cir. 2002) (employer cannot escape liability for discrimination by relying on seemingly neutral advice about employment decisions given by a biased employee); *EEOC v. Horizon Healthcare Corp.*, 220 F.3d 1184, 1199 n. 12 (10th Cir. 2000) (statements made by plaintiff's supervisors were probative of company's motivation even if the supervisors were not directly responsible for the challenged decisions); *Bickerstaff v. Vassar College*, 196 F.3d 435, 450 (2d Cir. 1999) (even absent impermissible bias on part of ultimate decisionmaker, bias may taint the decisionmaking process if the person with the bias played a role in that process); *Ercegovich v. Goodyear Tire Rubber Co.*, 154 F.3d 344, 354-55 (6th Cir. 1998) (despite lower court's view that Manager of Human Resources was sole decisionmaker, discriminatory remarks by Vice President overseeing the Retail Sales Division where plaintiff worked were probative because he participated in some of the discussions about the plaintiff and was in a position to shape the attitudes of the final decisionmaker).

Other courts have apparently rejected the "influence" test. For instance, despite evidence that a member of committees responsible for making promotion and pay-raise decisions uttered anti-Semitic and anti-Russian comments about a faculty member who was denied promotions and raises, the Fifth Circuit held that "stray remarks" were not probative of the reasons those decisions were made. *Rubinstein v. Administrators of Tulane Educational Fund,* 218 F.3d 392, 400-01 (5th Cir. 2000). Even biased remarks about pregnant woman made by a company's Chairman were not deemed to be attributable to the employer by the Third Circuit because the Chairman had delegated day-to-day decisionmaking to a Chief Operations Officer while retaining the power to ratify the decisions made by that person. *Pivirotto v. Innovative Systems, Inc.,* 191 F.3d 344, 358-59 (3d Cir. 1999).

The position taken by the Seventh Circuit seems to depend upon the composition of the panel deciding the case. In *Hunt v. City of Markham,* 219 F.3d 649, 653 (7th Cir. 2000), a case in which white police supervisors claimed to have discriminated against by black city officials, the court recognized that biased remarks made by persons who have input into employment decisions make it "possible to infer that the decision makers were influenced by those feelings in making their decision." Yet in Venturelli's case, despite evidence that Collins not only held but openly revealed his stereotyped attitudes about pregnant woman, and that he participated in discussions about Venturelli's hiring, the court of appeals declined to find (and did not ask whether a jury could find)

that Collins influenced the decision not to hire Venturelli while she was still pregnant.

C. The "agency" test

In some cases, the Seventh Circuit recognizes that a supervisor who carries out an employment decision and speaks to the employee about the reasons for that decision is presumed to be speaking for the decisionmaker, so that remarks demonstrating a discriminatory animus are imputed to the decisionmaker. *E.g., Oxman v. WLS-TV,* 846 F.2d 448, 456-57 (7th Cir. 1988) (where a subordinate officer who was not the decisionmaker told the employee of the employment decision, it is reasonable to infer that the reasons given by the subordinate officer were those authorized by the decisionmaker).

In Venturelli's case, however, the court held that Collins "dropped the ball" when he met with Venturelli by delivering his own decision about her future with the company, rather than Kinsey's. *Venturelli,* slip op. at 10. That conclusion is astonishing in light of Collins' testimony that he had exactly the conversation with Venturelli that Kinsey authorized him to have. According to Collins, Kinsey did not authorize Collins to offer Venturelli a job while Venturelli was still pregnant; she only authorized him to discuss a job offer that would allow Venturelli to begin her employment after she delivered her baby. (Dkt. 10, Collins dep. at 76-78) While Kinsey seeks to paint Collins as a rogue actor, the question on summary judgment is not whether the court of appeals thinks Kinsey is more believable than Collins, because the

court of appeals cannot determine credibility; it is whether the evidence viewed in the light most favorable to Venturelli supports her claim. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Under the logic of *Oxman*, a jury could find that Collins acted as Kinsey's agent when he explained to Venturelli that ARC didn't want to hire a pregnant woman for fear that a pregnant woman would not return to work after giving birth.

D. The "atmosphere" test

Even when the nexus between the biased remarks and decisionmaking authority is insufficient to allow the biased remarks to stand as direct evidence of discrimination, some courts recognize that the existence of such remarks in the workplace may provide indirect evidence of a discriminatory atmosphere that supports a claim of intentional discrimination. "[E]vidence of a corporate state-of-mind or a discriminatory atmosphere is not rendered irrelevant by its failure to coincide precisely with the particular actors or timeframe involved in the specific events that generated a claim of discriminatory treatment." *Conway v. Electro Switch Corp.*, 825 F.2d 593, 597-98 (1st Cir. 1987). The Sixth Circuit shares this view. *Ercegovich*, 154 F.3d at 356 (summary judgment for employer inappropriate where there is evidence of discriminatory corporate culture if person making discriminatory remarks is in upper management and remarks are not too attenuated from the challenged employment action).

The Seventh Circuit does not seem to think much of the "atmosphere" test. In

Swanson, 154 F.3d at 734, the court deemed nonprobative the testimony of a supervisor that senior managers with whom she socialized made clear that the employer intended to replace older workers with younger ones. Despite evidence of what amounted to a company policy, the court gave the evidence no weight because the supervisor lacked knowledge of the particular motivation for the particular employment decision at issue.

E. The need for Supreme Court clarification

Collins' position on a small employer's management team, and his admission that the executive director and her assistant regularly consulted with him about management decisions, would permit a jury to infer that Collins spoke on behalf of ARC when he told Venturelli that she wouldn't be hired until after she had her baby because "we want to see how this pregnancy thing turns out." In fact, Collins' repeated use of the word "we," given his position in the company, is sufficient evidence to permit a jury to infer that Collins is a decisionmaker.[5] His words should therefore have been attributed to ARC.

---

[5] Inexplicably, the court of appeals viewed Kinsey's testimony that "we clearly made a decision that we were going to hire Venturelli" as evidence that Collins participated in a decision to hire Venturelli ("No doubt Collins likely influenced Kinsey's decision to hire her, which is certainly not an adverse employment action."). *Venturelli,* slip op. at 10. Yet the court disregarded Collins' use of the word *we* when he explained that *we* wanted to wait

The various tests that courts have adopted to decide whether to impute biased comments to an employer all point to the conclusion that Collins spoke on ARC's behalf when he explained why ARC did not want to hire a pregnant woman. A jury could reasonably find that Collins was speaking on behalf of ARC or that he influenced ARC's decision to delay Venturelli's hiring until she was no longer pregnant. Yet a jury will never decide Venturelli's case, and other juries will never hear compelling evidence of discriminatory motivations in other cases, because of the inconsistent application of the standards that lower courts use to determine whether discriminatory words uttered by managers and supervisors constitute evidence of an employer's discriminatory intent. The law has become a quagmire that too often prevents meritorious claims from being heard, effectively nullifying the protections that Congress intended both the PDA and all of Title VII to afford. The Supreme Court should accept review of this case to guide lower courts when an employee has compelling evidence that an adverse employment decision was affected by the discriminatory intent of a highly placed company official.

"to see how this pregnancy thing turns out" before hiring Venturelli.

II. A Federal Court Deciding a Summary Judgment Motion in a Title VII Case Must Ask Whether the Totality of the Evidence, Both Direct and Indirect, Would Allow a Jury to Find That the Employer Acted With Discriminatory Intent

Discrimination cases brought under Title VII may be proved in two ways: by presenting direct evidence that a challenged employment decision was motivated by discriminatory intent, or by using the indirect, burden-shifting method articulated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973). If an employee chooses to rely solely on direct evidence, the methodology outlined in *McDonnell Douglas* is inapplicable. *Trans World Airlines, Inc. v. Thurston*, 469 F.3d 111, 121 (1985).

The Seventh Circuit has held that "direct evidence essentially requires an admission by the decision-maker that his actions were based on the prohibited animus." *Radue v. Kimberly-Clark Corp.*, 219 F.3d 612, 616 (7th Cir. 2000). It also noted that direct evidence will rarely exist to support a discrimination claim, *id.* — not a surprising result given the court's crabbed definition of "direct evidence." The court applied that definition in Venturelli's case, concluding that direct evidence is nothing less than the decisionmaker's admission that the employer was motivated by a discriminatory animus. *Venturelli*, slip op. at 7.

While recognizing that circumstantial evidence may be permitted by "the direct method" of proof, *Venturelli*, slip op. at 7, the court of appeals separately analyzed "direct

evidence" (i.e., admissions) and "circumstantial evidence" without asking whether the evidence that it viewed as insufficiently "direct" nonetheless made a circumstantial case of discrimination. By carefully cabining its analysis of direct and circumstantial evidence, the court of appeals disregarded the central question on summary judgment: whether the evidence as a whole would permit a jury to conclude that Venturelli's employer decided not to hire her because of her pregnancy. This approach disregards the Supreme Court's admonition that as long as a fact-finder "may fairly conclude, in light of all the evidence, that it is more likely than not that impermissible discrimination exists, the plaintiff is entitled to prevail." *Bazemore v. Friday*, 478 U.S. 385, 400-01 (1986). It also disregards the Court's condemnation of the failure to consider all of the evidence favoring the plaintiff as well as all reasonable inferences that support the plaintiff's case. *Reeves*, 530 U.S. at 150-51. Finally, it reflects a disturbing trend on the part of lower courts to raise the bar that employees must hurdle in discrimination cases by viewing each piece of evidence in isolation rather than asking whether the totality of the evidence entitles a plaintiff to a jury trial. *See, e.g., Shorter v. ICG Holdings, Inc.*, 188 F.3d 1204, 1213 (10th Cir. 1999) (Lucero, J., dissenting in part) (courts must avoid a "formalistic separation" of the direct and indirect methods of proof that prohibit consideration of all evidence that may defeat summary judgment because such a separation "would ignore the fact that the two frameworks are not ends in themselves, but rather means toward a common goal — identifying prohibited discrimination").

The court of appeals failed to consider whether crucial pieces of evidence, viewed together with the other evidence in the case, permitted an inference of discrimination despite its conclusion that the evidence was not "direct evidence" because it failed to constitute "an admission that ARC would not hire Venturelli because of pregnancy." *Venturelli,* slip op. at 8.

1. The Executive Director of ARC, Karen Kinsey, directed Michael Collins to offer Venturelli a job "when she came back" from delivering her baby. *Venturelli,* slip op. at 8. Collins testified that Kinsey only authorized him to discuss a job offer that would allow Venturelli to begin her employment after she delivered her baby, and never authorized him to convey an offer of employment to Venturelli that would have allowed Venturelli to begin her employment before she delivered her baby. (Dkt. 10, Collins dep. at 76-80)

The court of appeals did not view Kinsey's decision to condition a job offer upon Venturelli no longer being pregnant as "direct evidence" of pregnancy discrimination. *Venturelli,* slip op. at 8 ("An offer of employment to a pregnant woman beginning some time after she delivers her baby does not, in itself, prove that the employer would hire that same woman immediately, but for her pregnancy. The information does not in any way equate to an admission of discrimination and cannot be direct evidence of discrimination.") Yet the court of appeals failed to look at the totality of the evidence — the fact that ARC had been trying to fill the position for months and that Kinsey claimed that she wanted to fill the position as soon as possible (dkt. 10, Kinsey dep. at 8, 15, 46),

coupled with Collins' testimony that Kinsey would only allow Venturelli to be hired after she was no longer pregnant. Whether viewed as direct or circumstantial, the evidence is compelling that Kinsey's only reason not to hire Venturelli immediately was the fact of Venturelli's pregnancy. The court of appeals erred by rejecting this evidence on the ground that it wasn't "direct" without also asking whether it constituted circumstantial evidence of discriminatory intent that, together with the other evidence in the case, entitled Venturelli to a trial.

2. Judy Baldwin, the assistant director of ARC, is a decisionmaker who participates in the hiring of full-time office personnel and whose input into the hiring of Venturelli was solicited by Kinsey. (Baldwin dep. at 21, 34-36) Baldwin expressly told Venturelli that ARC was going to wait to hire her until she had her baby. (Dkt. 10, Venturelli dep. at 59) While this seems to be as "direct" as evidence can be regarding ARC's intent (particularly in light of Kinsey's desire to fill the position immediately), the court of appeals simply ignored it. Its decision to do so is consistent with the belief articulated in the panel's first (later withdrawn) opinion that it is not pregnancy discrimination to condition a job offer upon the applicant no longer being pregnant.

Instead, the court of appeals focused on Baldwin's statement to Venturelli that "ARC would like to offer her a job and a salary level, but that it would not be an advantage to her *at that time* because she would not be eligible for any [health care] benefits" related to her pregnancy because her pregnancy would be deemed a preexisting condition

excluded from coverage. *Venturelli,* slip op. at 8. (Dkt. 10, Venturelli dep. at 51-52) Although Baldwin gave Venturelli false information[6] that she claimed to have received from an insurance agent she conveniently could not identify (dkt. 10, Baldwin dep. at 43), the court of appeals deemed "any discussion about pregnancy being a preexisting condition" to be "totally irrelevant" because Venturelli probably would not have used ARC's insurance anyway. *Venturelli,* slip op. at 8-9 n.2. Having jettisoned Baldwin's statements as irrelevant, the court of appeals came to the remarkable conclusion that there "is no indication from Baldwin that ARC wouldn't hire Venturelli simply because she was pregnant," *Venturelli,* slip op. at 9, when Baldwin used the unavailability of insurance benefits as her explanation of ARC's decision not to extend a job offer to Venturelli until after her pregnancy ended. Again, whether or not Baldwin's statements constituted direct evidence, the totality of those statements provided at least circumstantial evidence of ARC's discriminatory intent.

◆

The amount of direct evidence required to defeat an employer's inevitable summary judgment motion is also the subject of conflict in the lower courts. In the Ninth Circuit, an employee "is required to produce 'very little' direct evidence of the employer's discriminatory intent to move past summary

---

[6]Under Wisconsin law, pregnancy cannot be excluded from group health coverage as a preexisting condition. Wis. Stat. § 632.746(2)(b).

judgment." *Chuang v. University of California Davis,* 225 F.3d 1115, 1128 (9th Cir. 2000) (citation omitted). In Venturelli's case, nothing less than an admission that "we discriminated against you" was viewed as direct proof of a discriminatory intent.

The court of appeals' analytical framework — a framework that simply did not ask whether a jury could infer from the totality of the evidence that ARC acted with discriminatory intent — creates precedent that will prevent employment discrimination plaintiffs with meritorious cases from having their claims decided by a jury. Because the Seventh Circuit's approach undermines the protections that the legislature intended to provide to pregnant women who seek jobs during their pregnancy (as well as the protections afforded to members of other classes by Title VII), the Supreme Court should grant *certiorari* to decide whether the court's decisional framework is consistent with Congressional intent.

III. To Make a Prima Facie Case of Pregnancy Discrimination, a Pregnant Woman Need Not Prove That She Was Not Hired Because of Her Pregnancy, and Need Not Complain to the Employer About Discrimination

As noted above, the court of appeals rejected all of Venturelli's direct evidence of discrimination, leaving her to establish an indirect case. To prove pregnancy discrimination using the *McDonald Douglas* burden-shifting method, the court required Venturelli to make a *prima facie* case by

proving that: (1) she was pregnant; (2) she was qualified for the position that she applied for; (3) she was rejected; and (4) either the position remained open, or it was filled with someone who wasn't pregnant.[7] *Venturelli*, slip op. at 14. There was no dispute that Venturelli applied for the job and that she was pregnant when she did so. *Id.*

The court of appeals concluded that it was "not so clear" that ARC failed to offer her a job during her pregnancy, despite its recognition that Venturelli was never offered a job that would have allowed her to start working during her pregnancy, but was only told that she could be hired after she had her baby.[8] *Id.* at 15. The court of appeals instead redefined the third element, holding that Venturelli did not "nail down the third element ... — that she was not hired *because she was pregnant.*" *Id.* (emphasis added). A prima facie case under the *McDonald Douglas* methodology does not require proof that a pregnant woman wasn't hired *because of her pregnancy* — that, after all, is the evidence upon which the direct method of proof relies.

---

[7] The court of appeals did not discuss whether ARC satisfied its burden of articulating a nondiscriminatory reason for its decision not to hire Venturelli during her pregnancy, or Venturelli's evidence that ARC's explanations were pretextual.

[8] Venturelli's affidavit in opposition to summary judgment expressly stated that she was never offered a job at ARC. (Dkt. 32, ¶¶ 1-3) To the extent that ARC disagrees, the disputed fact cannot be resolved on summary judgment. Fed. R. Civ. P. 56(c).

The *McDonald Douglas* method of proof permits an inference of discriminatory intent to be drawn from the combination of: (1) a prima facie case, and (2) evidence that the employer's explanation for its decision is pretextual. *Reeves,* 530 U.S. at 146-48. Requiring evidence of discriminatory intent as part of the prima facie case defeats the purpose of the *McDonald Douglas* method of proof.

Without explaining why, the court of appeals found it dispositive that Venturelli did not complain about Collins' offensive comments, did not complain about Baldwin's statement that it wouldn't be advantageous to Venturelli to make a job offer to her during her pregnancy, and did not return Kinsey's telephone call after she no longer worked for ARC as a temp.[9] *Venturelli,* slip op. at 15. This is not a sexual harassment case, where an employee may be required to complain about the harassment before turning to the court for redress. *See Burlington Industries, Inc. v. Ellerth,* 524 U.S. 742 (1998). The court cited no authority, and there is none, for the proposition that a job applicant who isn't offered a job must complain to the employer about discrimination before she will have a remedy for that discrimination. The Supreme Court should accept this case to resoundingly reject the new requirements for proof of a

---

[9] The only time that Kinsey called Venturelli after the end of Venturelli's service as a temp, she left a message saying that ARC did not need Venturelli to come in to train the new temp. There was no discussion of a job offer and no reason for Venturelli to respond to the message. (Dkt. 10, Venturelli dep. at 75)

prima facie case that the Seventh Circuit imposed in Venturelli's case.

IV. The Decision to Delay Hiring a Pregnant Woman Until After She Is No Longer Pregnant is Prohibited by Title VII

The fourth element of a *prima facie* case can be satisfied by evidence that a woman who was not pregnant was hired for the job. *Gleklen v. Democratic Congressional Campaign Committee, Inc.*, 199 F.3d 1365, 1368 (D.C. Cir. 2000); *Atchley v. Nordam Group, Inc.*, 180 F.3d 1143, 1148 (10th Cir. 1999). Venturelli satisfied that prong by presenting evidence that Laura Schleif was pregnant while working as a temp for ARC, but was not given a job as an ARC employee until after she had her baby. (Dkt. 10, Schleif dep. at 9, 13-14) ARC therefore hired a nonpregnant woman for the job that it did not offer to Venturelli.

Remarkably, the court of appeals found that ARC treated Venturelli and Schleif in exactly the same way by not hiring either of them during their pregnancies: "ARC would have allowed either to begin working in the permanent administrative assistant position *after she had delivered her baby.* In no sense can ARC be said to have treated Schleif any more favorably than it had treated Venturelli." *Venturelli,* slip op. at 17 (emphasis added). The court of appeals therefore concluded that the fourth prong of the *prima facie* case was not satisfied.

A *prima facie* case permits a factfinder to infer discriminatory intent from the fact that an employer treated someone outside the

protected class more favorably than it treated someone within the protected class, coupled with proof that its explanation for that disparate treatment is false. Venturelli presented evidence that she was not hired while she was pregnant, and that ARC hired Schleif after Schleif was no longer pregnant. Schleif was outside the protected class at the time of her hiring. ARC therefore treated a nonpregnant woman more favorably than it treated a pregnant woman. That is all that Venturelli needed to prove to satisfy the last element of a prima facie case.

The Seventh Circuit's analysis essentially adopted the district court's view that it does not violate the PDA to condition a job offer upon the termination of a woman's pregnancy, at least as long as the employer does so consistently. (Dkt. 34: 13) "A written or unwritten employment policy or practice which excludes from employment opportunities applicants or employees because of pregnancy ... is in prima facie violation of Title VII." 29 C.F.R. § 1604.10(a) (2001). Telling a woman that she cannot have a job until she is no longer pregnant excludes pregnant job applicants from current employment opportunities. The practice is, on its face, a violation of the PDA. Yet it is a practice that the Seventh Circuit's opinion will only encourage, provided that employers always tell job applicants that they will be considered for employment after they bear their babies. As long as employers discriminate consistently, a pregnant employee will never be able to satisfy the Seventh Circuit's test.

The Seventh Circuit has essentially held that an employer does not violate Title VII

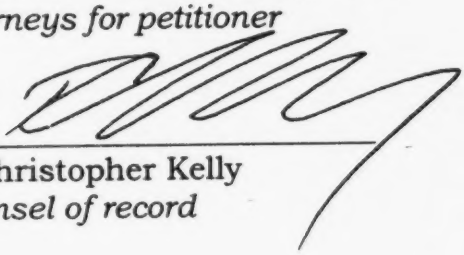
by telling a member of a protected class that she will be hired as soon as she leaves the protected class. The court's holding effectively nullifies the PDA. The Supreme Court should accept review of this case to assure that Congress' plan to end pregnancy discrimination is not thwarted in the Seventh Circuit.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

KELLY & HABERMEHL, S.C.
Attorneys for petitioner



T. Christopher Kelly
Counsel of record

Kelly & Habermehl, S.C.
145 W. Wilson St.
Madison, WI 53703
Tel. (608) 255-9491
FAX (608) 255-6137
email: kellyhabermehl@earthlink.net

APPENDIX A

In the
United States Court of Appeals
For the Seventh Circuit

No. 02-2294

CELENA VENTURELLI,

Plaintiff-Appellant,

v.

ARC COMMUNITY SERVICES, INC.,

Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Wisconsin.
No. 01 C 912—**Rudolph T. Randa**, *Chief Judge.*

ARGUED DECEMBER 3, 2002—DECIDED NOVEMBER 26, 2003
ON RESUBMISSION*

Before EASTERBROOK, MANION, and EVANS, *Circuit Judges.*

MANION, *Circuit Judge.* Celena Venturelli, who was several months pregnant, worked for a temporary employ-

* This court originally affirmed the decision of the district court in *Venturelli v. ARC Community Services, Inc.*, 336 F.3d 606 (7th Cir. 2003). However, we subsequently granted Ms. Venturelli's petition for rehearing and vacated our original opinion. This revised opinion has been circulated among all active judges pursuant to the petition for rehearing en banc (Judge Coffey and Judge Ripple did not participate in the consideration or decision of the petition). No judge favored a rehearing. We are issuing this revised opinion without additional oral argument.

ment agency and was assigned to work for ARC Community Services, a social services agency principally devoted to helping women with various problems. Venturelli performed very well and ARC hoped to hire her full time for a vacant administrative assistant position. But when one of her supervisors discussed the job with her, she was left with the impression that ARC would not hire her while she was pregnant, and she quickly lost interest in the job. She completed her predesignated term as a temporary employee and departed, but she did not return ARC's calls after she left to have her baby. ARC eventually hired someone else. Venturelli then sued ARC for unlawful discrimination in violation of Title VII, 42 U.S.C. § 2000e-2(a)(1), as amended by the Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k). The district court granted ARC's motion for summary judgment. Venturelli appeals, and we affirm.

I.

ARC Community Services, Incorporated (ARC) is a not-for-profit corporation that serves women involved with the criminal justice system, women who have drug problems, and women who are pregnant. In October 1999, the Adecco Employment Agency assigned Celena Venturelli, who was visibly pregnant and due to deliver in March 2000, to work at ARC as a receptionist. Adecco had an agreement with its clients, including ARC, that a temporarily assigned employee ("temp") like Venturelli would have to work at least 520 hours before the employer could hire that person permanently. Violation of this agreement would subject the employer to a monetary penalty.

Venturelli arrived at ARC at a busy time. ARC was in the process of preparing two important grants that were essential for funding for the following year. Venturelli worked

closely with Assistant Director Judy Baldwin in preparing one of those grants. Baldwin was very impressed with Venturelli's performance and suggested to Executive Director Karen Kinsey that Venturelli would be an excellent candidate for the administrative assistant position that ARC was attempting to fill. At a meeting in January 2000 with Baldwin and Michael Collins, the ARC services comptroller, Kinsey concluded that they should offer Venturelli the position. Since Collins was the person who was in charge of monitoring the temporary employees and keeping track of their time, Kinsey told Collins to meet with Venturelli and discuss the possibility of Venturelli taking the job.[1]

That turned out to be an unfortunate assignment. On two occasions, one shortly before and one shortly after the Martin Luther King holiday in January 2000, Collins met with Venturelli in his office. Instead of simply offering her the job, Collins went into a detailed discussion about Venturelli's pregnancy and how she would deal with it in the event she took a permanent position with ARC. He made comments about how some women change their mind once they have the child in their arms. As he contends in his deposition, he was attempting to let Venturelli know that there would be no rush to come back to the job on a permanent basis. Instead, she would be able to take the time she thought was necessary to stay at home with her child. Collins may have thought he was being magnanimous when he suggested that Venturelli could change her

---

[1] According to the deposition testimony of both Kinsey and Baldwin, Kinsey had ordered Collins to offer Venturelli the job. In Collins' deposition testimony, however, he recalled that Kinsey had told him "to tell [Venturelli] that she had a job when she came back."

mind about when and if she wanted to come to work full time after she had the baby, but Venturelli was taken aback by this discussion. She interpreted Collins' comments about women and babies as an indication that ARC did not want to hire pregnant women. Although Venturelli was "shocked" by this conversation, she remained stoic and did not raise any objections to these references that she perceived as stereotyping working mothers.

A few days later, at the direction of Kinsey, Baldwin spoke with Venturelli, and she also stated that ARC was interested in hiring Venturelli for the job of administrative assistant. Venturelli responded to that overture by saying that she wanted to think about the matter and talk some more about it. Baldwin assumed she wanted to talk it over with her husband and did not pursue the issue further. Venturelli did not get back to Baldwin with her response, and when Kinsey learned of this she simply assumed that they could not force Venturelli to take the job. Venturelli did not mention her concern about Collins' statements when she met with Baldwin, nor did she make any contact with Kinsey with the same complaints.

During Venturelli's meeting with Baldwin, they discussed insurance and whether pregnancy would be a preexisting condition under ARC's policy. Baldwin did not know, so she called ARC's insurance carrier while Venturelli was in the room. After attempting to contact two people who turned out not to be available, Baldwin talked with a third person at the insurance company, whom Baldwin cannot identify. That person informed Baldwin, it turns out incorrectly, that pregnancy was a preexisting condition. Baldwin passed on the information to Venturelli, thus implying that, if Venturelli were immediately to begin working for ARC full time, her pregnancy would not be covered. As it was, Venturelli's husband was employed

and she was then receiving benefits on his employer's medical plan. And, as Kinsey later acknowledged, putting Venturelli on ARC's medical plan would have had no impact on the organization's premiums.

After this conversation, Venturelli continued the remaining time at ARC in her temporary status. Her last day of work was February 24, a date she had set early on in anticipation of her March 12 due date. The office workers gave her a baby shower on that day, and then she left, never to return.

After Venturelli's departure, ARC officials made several attempts to contact her, but no one was able to reach her personally and so they simply left voicemail messages. Venturelli purposely did not return those calls because, at that point, she had decided that she did not want to return to ARC. After remaining at home with her baby for about five months, Venturelli applied for, and obtained, employment with a different employer.

In the meantime, in hopes that Venturelli would accept the full-time administrative assistant position, ARC hired in succession two temporary employees to perform the job. However, after ARC finally did not hear back from Venturelli, it hired another person, Laura Schleif, for the full-time position. Schleif was pregnant at the time ARC expressed interest in hiring her, and ARC told her that she could begin the job after she delivered her baby. That is what Schleif did, even though she had left to have her baby before completing the 520-hour requirement. Schleif's hiring occurred at approximately the same time that Venturelli took a new job with a different corporation. As it turned out, Venturelli herself had met the 520-hour requirement on February 14, approximately ten days before her last day at ARC. The record does not show how much Venturelli would have been paid had she been given a full-

time position sometime between February 14 and February 24. Nor is there any indication, had she taken a full-time position and had the expenses for the delivery of her child placed on ARC's medical plan, whether there would have been any difference in coverage of expenses from her husband's employer's medical plan.

Venturelli eventually filed a complaint with the Equal Employment Opportunity Commission and then sued under Title VII, accusing ARC of refusing to hire her because she was pregnant. The district court granted ARC's motion for summary judgment and Venturelli appeals.

II.

This court reviews the district court's grant of summary judgment de novo, construing all facts in favor of Venturelli, the nonmoving party. *Rogers v. City of Chicago*, 320 F.3d 748, 752 (7th Cir. 2003). Summary judgment is proper when the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). Thus, "[s]ummary judgment is appropriate if, on the record as a whole, a rational trier of fact could not find for the non-moving party." *Rogers*, 320 F.3d at 752.

Under Title VII, it is unlawful for most employers "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to . . . compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex. . . ." 42 U.S.C. § 2000e-2(a)(1). The phrase "because of sex" has been defined by the Pregnancy Discrimination Act (PDA), through which Congress amended Title VII in 1978, to

mean "because of or on the basis of pregnancy, childbirth, or related medical conditions." 42 U.S.C. § 2000e(k). Venturelli's complaint is that ARC violated Title VII when it failed to hire her in January or February 2000 because of her pregnancy. As it is undisputed that ARC is an employer subject to Title VII, the question on appeal is whether a reasonable jury could conclude that ARC failed to hire Venturelli at some point because she was pregnant. She has available the direct method or the indirect method to prove her case. *Troupe v. May Dep't Stores Co.*, 20 F.3d 734, 736 (7th Cir. 1994).

A. The Direct Method

Under the direct method, there are two types of permissible evidence. First, there is direct evidence, or evidence that, if believed by the trier of fact, would prove the fact in question "without reliance on inference or presumption." *Rogers*, 320 F.3d at 753 (internal quotation omitted). Direct evidence "essentially requires an admission by the decision-maker that his actions were based upon the prohibited animus." *Id.* (internal quotation omitted). For obvious reasons, we rarely encounter direct evidence. *Id.* The second type of evidence permitted under the direct method is circumstantial evidence, or evidence that allows a jury to infer intentional discrimination by the decisionmaker. *Id.*

1. Direct evidence.

Venturelli contends that "[t]he three key members of ARC's management team—Kinsey, Baldwin, and Collins—each provide direct proof" that ARC violated the PDA by refusing to hire her while she was pregnant. As to Kinsey, Venturelli first puts forth Collins' statement to the

effect that Kinsey told him to offer Venturelli a job "when she came back" from delivering her baby. In Venturelli's view, this remark is direct evidence; i.e., it is tantamount to Kinsey's admission that ARC would not hire Venturelli because of pregnancy. We disagree. An offer of employment to a pregnant woman beginning some time after she delivers her baby does not, in itself, prove that the employer would hire that same woman immediately, but for her pregnancy. This information does not in any way equate to an admission of discrimination and cannot be direct evidence of discrimination. We therefore conclude that there is no direct evidence in relation to Kinsey.

Nor is there any direct evidence attributable to Baldwin. To begin with, there is no dispute that Venturelli had planned to leave ARC on February 24 in anticipation of her baby's birth, so clearly any decision about hiring her for a permanent position had to take into account her forthcoming absence. In her February 1 meeting with Baldwin, the discussion centered on insurance. It is not clear from Venturelli's testimony who raised the subject (Baldwin said Venturelli did). Baldwin told her ARC would like to offer her a job and a salary level, but that it would not be an advantage to her at that time because she would not be eligible for any benefits. At the time Venturelli was covered by her husband's employer's benefit program. As discussed above, it turned out that Baldwin's information on benefits was incorrect,[2] but the point of the discussion was

---

[2] Venturelli now asserts that this erroneous report from the insurance company was a "lie" used as an excuse not to hire her while she was pregnant. Venturelli's own evidence negates that theory. Venturelli wrote in her handwritten account of her meeting with Collins on Thursday, January 13, 2000, that she had told

(continued...)

that Venturelli would continue her present job as a temp until her predesignated departure date (February 24) and return as a regular employee as the administrative assistant. There is no indication from Baldwin that ARC wouldn't hire Venturelli simply because she was pregnant.

That leaves Collins' message about new mothers and their desire to stay home with their babies. As discussed above, for Collins' comments to constitute direct evidence he would have had to have been a decisionmaker. "A decisionmaker is the person responsible for the contested decision." *Rogers*, 320 F.3d at 754 (internal quotation omitted). Here, the contested decision was the alleged determination not to hire Venturelli for a position on the permanent clerical staff at ARC. The undisputed evidence establishes that Collins himself lacked the authority to make this decision: both Kinsey and Collins testified that Collins did not have the power to hire, or to decide not to hire, Venturelli.

To show that Collins was a decisionmaker, Venturelli refers to the deposition testimony of Collins, in which he stated that, as comptroller, he was part of the ARC management team, that he regularly consulted with Kinsey and Baldwin, and that Kinsey often asked for his input into management decisions. None of this shows that Collins was responsible for the decision to hire or not to hire Venturelli. Proving that Collins had input into ARC applicants' qualifications does not establish that he had any responsibility for the actual decision to hire Venturelli. Still,

---

[2] (...continued)
him that she "had ins[urance] through where [her husband] worked, and [she] would stay w/that ins[urance] until after the baby was born then switch to ARC." Thus any discussion about pregnancy being a preexisting condition is totally irrelevant.

Venturelli points to Kinsey's deposition where she testified that she had relied upon Collins' advice at her meeting in January with Baldwin and Collins regarding Venturelli's hiring. Kinsey said that "we clearly made a decision that we were going to hire Venturelli." Significantly, this underscores the fact that the decision was to hire Venturelli. Only if Collins had recommended that Venturelli *not* be hired, and Kinsey had followed that recommendation, would this reference make any sense. Obviously Kinsey's testimony would not allow a reasonable jury to find that Collins was a decisionmaker in the alleged decision *not* to hire Venturelli while she was pregnant. What Kinsey actually said was that, at the January meeting, she had relied on the advice of Collins and then, at the end of that meeting, had made the decision that "We would like to hire [Venturelli] as soon as possible." No doubt Collins likely influenced Kinsey's decision to hire her, which is certainly not an adverse employment action. Collins apparently dropped the ball when he met with Venturelli to offer her the job. But it was Kinsey's decision that he was supposed to deliver, not his.

Sometime thereafter Kinsey directed Baldwin to talk to Venturelli "to make sure she understood the job offer had been made and to try to pin it down" because "she didn't understand why that hadn't been accomplished." But when Baldwin did meet with Venturelli about the job, Venturelli said she had to talk about it (presumably with her husband). When Baldwin told Kinsey about the results of the meeting, Kinsey's reply was "Well, [we] can't force her to accept the job."

In her own testimony, Venturelli explained why she did not want to tell Kinsey or Baldwin about Collins' comments. She wanted to "tuck it away" and in anticipation of the baby did not want to "risk getting high blood pres-

sure." She did not want to bring it up "while I was pregnant or while I was a first-time mom." Instead of accepting (or rejecting) what was obviously a job offer, she chose to put it off because she was not willing to commit under the existing circumstances. And after she left to have her baby, she refused to return calls from ARC because she "did not want to work for an employer that would discriminate against a pregnant woman." But her undisclosed perception notwithstanding, there is absolutely no evidence in the record that the decisionmakers, Kinsey and Baldwin, refused to hire her because she was pregnant.

2. Circumstantial evidence under the direct method.

Although there is no direct evidence of discrimination, Venturelli claims these are "bits of evidence that lend circumstantial support to inferences of discrimination." There are three categories of circumstantial evidence under the direct approach, each of which may suffice by itself to establish discrimination, or may be used in conjunction with one or both of the other categories. *Troupe*, 20 F.3d at 736. The first category consists of "suspicious timing, ambiguous statements oral or written, behavior toward or comments directed at other employees in the protected group, and other bits and pieces from which an inference of discriminatory intent might be drawn." *Id.* The second type requires a showing that the employer systematically treated other, similarly situated, non-pregnant employees better. *Id.* The third type is evidence that the plaintiff was qualified for the position in question but passed over in favor of a person not having the forbidden characteristic and that the employer's stated reason for its decision is "unworthy of belief, a mere pretext for discrimination." *Id.* The latter category "is substantially the same as the evidence required" under the indirect method. *Huff v. UARCO, Inc.*, 122 F.3d 374, 380 (7th Cir. 1997).

As circumstantial evidence, Venturelli first cites ARC's "schizophrenic . . . assessment of Venturelli's value as an employee." According to Venturelli, although ARC often praised Venturelli's performance, in a letter from its attorney to the Wisconsin Equal Rights Division, it also complained falsely that Venturelli (1) failed to work a forty-hour week; (2) worked an inconsistent number of hours; (3) "simply stopped coming to work after February 24, 2000"; and (4) "failed to inform ARC and Adecco that she had no intention of returning to work." Venturelli relies on *Hasham v. California State Bd. of Equalization*, 200 F.3d 1035, 1049 (7th Cir. 2000) for the proposition that where the employer makes false statements about an employee's job performance, "a jury is entitled to view the false statements as circumstantial evidence of a discriminatory intent."

Venturelli misplaces her reliance on *Hasham*. The part of *Hasham* to which she cites holds that contradictory statements about the quality of an employee's work are evidence that the employer's stated reason for the adverse employment action was pretextual *under the indirect method*. *Id.* Circumstantial evidence under the direct method, however, must allow a jury to infer more than pretext; it must itself show that the decisionmaker acted because of the prohibited animus. None of the statements to which Venturelli points fits within any of the three categories that we delineated in *Troupe*. All that these statements show is that, in addition to its praise of Venturelli's work, ARC also offered some additional observations. In fact, there is no dispute that as a temp she worked less than 40 hours per week, that the hours worked were somewhat irregular, that she did stop coming to work after February 24, and that she did not return several calls of inquiry from ARC regarding her intent to return. Significantly, the attorney's letter emphasized that they wanted to hire her after the 520-hour

penalty period ended, but because of her irregular hours it was not certain when that time period would expire. She left before they had that calculation. In short, the record verifies the facts set out in a letter that is mislabeled schizophrenic.

The second piece of circumstantial evidence to which Venturelli points is Baldwin's telephone conversation with ARC's insurance carrier, made in Venturelli's presence, where Baldwin relayed incorrect information that Venturelli would not be eligible for health benefits were ARC to hire her immediately. Venturelli argues that the record would allow a jury (1) to conclude that Baldwin was lying, as opposed to relying honestly on what the insurance company told her, and (2) to infer that "the lie could only have been intended to discourage Venturelli from pursuing employment at ARC during her pregnancy."

For such a statement to be sufficient circumstantial evidence under the direct method, the remark in question must be "directly related to the employment decision." *Gorence v. Eagle Food Centers, Inc.*, 242 F.3d 759, 762 (7th Cir. 2001). Venturelli, however, adduces no evidence that Baldwin's alleged lie about the insurance was in any way related to ARC's decision not to hire her as of January or February 2000. The only record evidence concerning the incorrect information that pregnancy was an uninsured preexisting condition is Kinsey's testimony that including Venturelli on ARC's insurance coverage would have no effect "because our health insurance costs us the same whether someone is pregnant or not pregnant." And as discussed earlier, Venturelli was already receiving insurance benefits from her husband's employer, and she intended to stay with that insurance until after the baby was born. *See* fn.2 *supra*. We thus conclude that this piece of evidence does not entitle Venturelli to reach a jury under

the direct method. Because Venturelli puts forth no further evidence under the direct method, we turn to her evidence in relation to the indirect method.

B. Indirect Method

Under the indirect method of proof, a plaintiff must first establish a prima facie case of discrimination. To make a prima facie case, Venturelli must show that: (1) she was pregnant; (2) she applied and was qualified for the position sought; (3) she was rejected; and (4) the position remained open and ARC continued to seek applicants from persons of Venturelli's qualifications. *Heerdink v. Amoco Oil Co.*, 919 F.2d 1256, 1259 (7th Cir. 1990). An alternate means of proving prong four is to establish that someone who was not pregnant received more favorable treatment. *Mills v. Health Care Servs. Corp.*, 171 F.3d 450, 454 (7th Cir. 1999) (citing *E.E.O.C. v. Our Lady of Resurrection Med. Center*, 77 F.3d 145, 148 (7th Cir. 1996)). If Venturelli were to establish a prima facie case, to avoid liability ARC would then have to come forward with a non-invidious reason for its decision. *Rogers*, 320 F.3d at 755. If ARC were to meet its burden of production, to avoid summary judgment Venturelli would then have the burden to present competent evidence that the proffered non-discriminatory explanation is pretextual.

No dispute exists regarding the first two elements of the prima facie case. The third element is not so clear. The district court held, and ARC argues, that Venturelli does not meet prong three because ARC did, in fact, offer her the job. A review of the record underscores how the parties were not connecting in their communications with each other. Clearly ARC wanted to hire Venturelli as the administrative assistant. However, Collins' ramblings about

motherhood apparently reduced or even eliminated Venturelli's desire to accept a permanent job at ARC. Unfortunately she said nothing to Collins, Baldwin or Kinsey about her concern of a perceived negative attitude toward pregnant employees at ARC (an organization whose mission included helping pregnant women). Further clouding the picture was the projected expiration of the 520-hour penalty period that would enable ARC to hire Venturelli. But when Venturelli met with Collins and later Baldwin, the date of the expiration of that time period had not yet been determined. As was later calculated, that expiration date was February 14, ten days before Venturelli's chosen departure date of February 24. So while there apparently was an offer made by ARC for Venturelli to be administrative assistant after the time off she needed after she had her baby, there is no indication in light of the evidence favorable to Venturelli of an offer to hire her during that ten-day period before she voluntarily left the temporary assignment at ARC.

But that gap does not nail down the third element for Venturelli—that she was not hired because she was pregnant. Not only did she remain silent when, at two separate meetings, Collins made what she concluded were offensive comments; she said nothing about her concerns at her subsequent meeting with Baldwin, an undisputed employment decisionmaker, when the hiring discussion digressed into whether pregnancy was a preexisting condition under ARC's benefits package. Nor did she return Kinsey's call (to discuss the administrative assistant position), a clear opportunity to raise her concern with ARC's executive director. Their response would have presented evidence of whether they would or would not have hired her (or even if she wanted to be hired) during that ten-day period while she was pregnant. All that remains is

Venturelli's conjecture of what Collins meant when he expressed concern about whether and when Venturelli would return to ARC after she had the baby. That is not enough.

Venturelli's claim falls short under the fourth element as well. For the fourth element of the prima facie case, we determine whether the position remained open and ARC continued to seek applicants from persons of Venturelli's qualifications. In her opening brief, Venturelli contends that she meets prong four because ARC "continued to seek applicants for the position." The undisputed evidence, however, is to the contrary. In December 1999, with the decision to offer the administrative assistant position to Venturelli, ARC canceled all advertising for that vacancy. Even after its final communications with Venturelli in February 2000, when any rejection would have had to have been made, ARC continued for several months to staff the position of permanent administrative assistant with temporary employees in anticipation that Venturelli would eventually fill the position. There is no evidence in the record that ARC continued seeking applicants. It was only after June 2000, after several attempts to contact Venturelli and months of not hearing back from her, that ARC sought new applications for the position of administrative assistant. Thus, even if ARC had, in fact, rejected Venturelli for the position in January or February 2000, there is not a shred of evidence that it then *continued* to seek applicants for the permanent post of administrative assistant from people of Venturelli's qualifications.

Venturelli also argues that she can satisfy prong four by showing that ARC treated someone who was not pregnant more favorably, pointing specifically to ARC's process for hiring Laura Schleif beginning in August 2000, roughly five months after Venturelli had ceased job-related contacts

with ARC. This argument fails because Venturelli points to no evidence that would allow a jury to conclude that ARC treated Schleif any more favorably than it treated Venturelli. Like Venturelli, Schleif was pregnant and a temporary employee when ARC decided to hire her as an administrative assistant. As it had advised Venturelli, ARC told Schleif that she could begin the job after she had her baby. The only difference between Schleif and Venturelli is that Schleif was apparently hired before she completed the 520-hour requirement. Had Venturelli, like Schleif, chosen to accept the full-time position after delivering her baby, she too could have returned to ARC as soon thereafter as she desired. In other words, Venturelli and Schleif were, in all relevant aspects, treated the same: ARC would have allowed either to begin working in the permanent administrative assistant position after she had delivered her baby. In no sense can ARC be said to have treated Schleif any more favorably than it had treated Venturelli.

We hold that, because Venturelli cannot establish the third or fourth elements of the prima facie case, she is not entitled to reach a jury via the indirect method of proving a Title VII violation.

III.

From start to finish this is an unfortunate sequence of events. ARC wanted to hire Venturelli as administrative assistant and at some point she wanted the job. But communications broke down when Collins callously muddled a job offer by referring to his perceptions of mothers and their new babies. Although Venturelli was offended, she said nothing to Collins, nor did she discuss her concerns with Kinsey or Baldwin. She left the temporary job as scheduled and never returned calls about the job. Venturelli

does not present direct or circumstantial evidence sufficient to proceed under the direct method of proving discrimination. Also, she is unable to produce evidence under the indirect method for establishing the third or fourth elements of a prima facie case. We therefore AFFIRM the district court.

EVANS, *Circuit Judge*, dissenting. When originally dissenting to the opinion we have now vacated, *Venturelli v. ARC Community Services, Inc.*, 336 F.3d 606, 618 (7th Cir. 2003), I noted that this case was much closer to *Maldonado v. U.S. Bank*, 186 F.3d 759 (7th Cir. 1999), than *Troupe v. May Department Stores Co.*, 20 F.3d 734 (7th Cir. 1994). In the majority's new opinion, *Maldonado* is not mentioned, and a question left unanswered the first time around—whether Mr. Collins was "a decisionmaker"—is answered against Ms. Venturelli, as the court now concludes as a matter of law that he was not. That conclusion, given that ARC was a small operation and Collins was its comptroller, is questionable. But the conclusion certainly does one thing—it excuses the majority from laying Collins' stereotyping remarks on ARC's doorstep. I think the facts—including whether Collins was a decisionmaker—are sufficiently in dispute so as to preclude summary judgment. I would let a jury decide this case, and so I continue to dissent.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

[Filed May 3, 2002]

IN UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Case No. 01-C-912

CELENA VENTURELLI,

Plaintiff,

v.

ARC COMMUNITY SERVICES, INC,

Defendant.

DECISION AND ORDER

The plaintiff, Celena Venturelli ("Venturelli"), has brought suit under the Pregnancy Discrimination Act, which amended Title VII to provide that discrimination on the basis of pregnancy is an unlawful employment practice. *See* 42 U.S.C. § 2000e(k). Venturelli alleges that her former employer, ARC Community Services, Inc. ("ARC"), discriminated against her by not offering her a permanent, full-time position because of her pregnancy. ARC has moved for summary judgment. For the reasons stated below, ARC's motion is granted, and the case is dismissed.[1]

---

[1] Venturelli has filed a "Motion to File Amended and Supplemental Materials in Response to Summary Judgment Motion." This motion is granted. Venturelli has also filed a

BACKGROUND[2]

ARC is a non-profit organization which provides services to women in the criminal justice system, women with problems of substance abuse, and pregnant women.[3] Venturelli began working at ARC's administrative office on October 19, 1999 as a temporary receptionist. She was assigned to work there by Adecco, a temporary employment agency. Venturelli was pregnant when she began working at ARC, and she openly discussed her pregnancy with her co-workers. Her baby was due in March of 2000, and she informed ARC that her last day of work before leaving to have her baby would be during the week ending February 27, 2000.

As a receptionist, Venturelli performed typical receptionist duties, including greeting visitors, answering the telephone, and providing clerical support. Venturelli also performed some of the duties of an "administrative assistant." In November or December of 1999, ARC's executive director,

---

"Motion to Strike Defendant's Reply Concerning its Proposed Findings of Fact." This motion is also granted. *See* Civil L.R. 56.2. The Court in no way relies upon ARC's Reply Concerning its Proposed Findings of Fact in reaching its decision today.

[2] Unless otherwise noted, the following facts are undisputed.

[3] ARC's principal place of business is in Dane County, Wisconsin, and although Dane County is located in the Western District of Wisconsin, this case is properly venued here pursuant to Judge Barbara Crabb's September 4, 2001 Order which transferred the matter to the Eastern District of Wisconsin.

Karen Kinsey ("Kinsey"), became aware that Venturelli was interested in the administrative assistant position. ARC was pleased with Venturelli's work performance, so in January of 2000, Kinsey, along with Judy Baldwin ("Baldwin"), ARC's Executive Director, and Michael Collins ("Collins"), ARC's Controller, held a meeting to discuss offering the administrative position to Venturelli.[4] At the meeting, Kinsey directed Collins and Baldwin to offer Venturelli the permanent administrative assistant position contingent upon her completing 520 hours of service with ARC.[5] By contract, ARC was penalized if it hired an Adecco employee full-time before he or she completed 520 hours of service with ARC, a requirement that Venturelli had yet to meet. Collins estimated that Venturelli would complete this requirement about the same time she intended to leave ARC to have her baby.[6]

---

[4] The Court will at times refer to Kinsey, Collins, and Baldwin collectively as "ARC" or "ARC's hiring authorities," although the Court is cognizant of the parties' dispute over who was authorized to make personnel decisions at ARC.

[5] Venturelli disputes this fact, noting that Collins testified that he was "directed only to ask whether she was interested in the position" and that Baldwin does not remember whether the offer was contingent upon completing the service requirement. Plaintiff's response to Defendant's Proposed Findings of Fact ("PR"), ¶ 52.

[6] Venturelli argues that she completed the 520 hour service requirement on February 14, 2000, one week before her last day at ARC. ARC disputes Venturelli's calculations, but notes that at the time it did not keep a precise estimate. The parties do not dispute that the service requirement was met sometime in February, the same month Venturelli was scheduled to leave work.

Sometime after the staff meeting in January of 2000, Venturelli discussed the permanent position with Collins.[7] Collins informed Venturelli that they could not yet offer her the position because of the 520-hour service requirement. However, according to Venturelli, Collins also said "We want to wait . . . We want to see how this pregnancy thing turns out." Plaintiff's Proposed Findings of Fact ("PPFOF"), ¶ 113 (citing Venturelli's deposition). Venturelli also testified that Collins said: "I know how you women are. Once you have that baby, you're not going to want to return." PPFOF, ¶ 114. Venturelli testified further that Collins asked her if she intended to return to work after having her baby, whether she would use ARC's insurance for labor and delivery if she were hired before she had her baby, what she would do if the baby were sick and she could not come to work, an if Venturelli had made plans for day care. PPFOF, ¶¶ 115-118. According to Venturelli, Collins concluded the conversation by saying "we" want to wait to see how this pregnancy thing turns out, and further: "We know how you women get once you have that baby." PPFOF, ¶¶ 119-20. Collins denied making these comments. See Defendant's Response to PPFOF ("DR"), ¶¶ 112-120. Rather, Collins testified that at the January 13 meeting, he told Venturelli: "before the child is born you say you can come back to work and you can come back to work in six or eight weeks . . . Give yourself some time.

---

[7] Venturelli pinpoints the date of the conversation as January 13, 2000.

Before the child is born, you say six weeks. But after the child is born, you start to realize maybe I need more time than six weeks." Collins Dep. Pp. 83-84. Collins only admitted to having a general discussion with Venturelli about her day care plans. DR, ¶ 118.

On January 14, 2000, Kinsey called Venturelli at the office to inform her that she would not be coming to work that day. During the conversation, Kinsey told Venturelli that ARC would like to have her as an employee and "maybe we could wok something out." Kinsey told Venturelli that she wanted to talk to her about the position some time during the next week, but the discussion never took place. Subsequently, Venturelli had another meeting with Collins. Collins told Venturelli that they did not want to "leave her hanging" about the job and that she would have a job to come back to after her pregnancy. According to Venturelli, Collins went on to repeat the comments described above ("We know how you women are ..."), comments Collins once again denies making.

On February 1, 2000, Venturelli discussed the administrative assistant position with Baldwin. According to Venturelli, Baldwin told her that she would like to offer her the job but it would not be to Venturelli's advantage to take it because even if they hired her, Venturelli would not be eligible for health insurance benefits to cover her pregnancy. PPFOF, ¶ 159. Baldwin testified that she made Venturelli a job offer, and while discussing salary and benefits, Venturelli asked Baldwin whether pregnancy was a pre-existing condition under ARC's

health insurance policy. DR, ¶ 159. Baldwin contacted ARC's health insurance agent who incorrectly informed her that pregnancy was a pre-existing condition. *Id.* Thus, Baldwin told Venturelli she did not have to rush accepting the offer, and she could contact ARC when she was ready to fill the position. *Id.* After the meeting, Baldwin informed Kinsey that Venturelli was not sure if she was interested in the job.

ARC held a baby shower for Venturelli on February 24, 2000, Venturelli's last day of employment with ARC. Subsequently, Venturelli's position was filled with temporary employees in the hope that Venturelli, after giving birth to her child, would return to work at ARC. According to Kinsey, after Venturelli left and before she gave birth on March 22, 2000, she called Venturelli and left the following phone message: "we would like to hear from [you] about the job, that we [are] holding the job open for [you], the administrative assistant job open for [you]."[8] DPFOF, ¶ 82. Venturelli denies ever receiving this message, claiming that Kinsey only called to tell her that she did not need to come in to help train the new receptionist. PR, ¶¶ 81-82. ARC filled the permanent position when it became clear that Venturelli was not going to return. Venturelli chose not to accept a position with ARC after giving birth to he [sic] child because she was hurt and offended by the knowledge that ARC would not hire her as an ARC employee during her pregnancy. DPFOF, ¶ 202.

---

[8] According to phone records provided by ARC, the likely date of this phone call was March 15, 2000. DR, ¶ 81.

ANALYSIS

Summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). Accordingly, "the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The Court must view the record in the light most favorable to the non-movant Venturelli and draw all reasonable inferences from the record in her favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986).

Pregnancy Discrimination: Framework and General Principles

Title VII makes it "an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or to otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex." 42 U.S.C. § 2000e-2(a). The Pregnancy Discrimination Act ("PDA") amended Title VII, making it clear that "[t]he terms 'because of sex' and 'on the basis of sex' include, but are not limited to, because of or on the basis of

pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment purposes." Pub. L. No. 95-555, 92 Stat. 445 (codified as amended at 42 U.S.C. § 2000e(k)). Congress "designed the PDA specifically to address the stereotype that 'women are less desirable employees because they are liable to become pregnant,' and to insure that the decision whether to work while pregnant 'was reserved for each individual woman to make for herself.'" *Maldonado v. U.S. Bank*, 186 F.3d 759, 763 (7th Cir. 1999) (quoting *Sheehan v. Donlen Corp.*, 173 F.3d 1039, 1044-45 (7th Cir. 1999) and *International Union, United Auto Workers v. Johnson Controls, Inc.*, 499 U.S. 187, 206 (1991)). "The basic principle of the Act is that women affected by pregnancy and related conditions must be treated the same as other applicants and employees on the basis of their ability or inability to work." 29 C.F.R. § 1604, App.

To prevail, Venturelli must show that she was subject to an adverse employment action *because of her pregnancy*. She can do this in one of two ways. First, she can proceed under the so-called "mixed motives" approach. Alternatively, Venturelli can proceed under the familiar *McDonnel Douglas* burden-shifting framework. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). Venturelli attempts, but fails, to defeat summary judgment under both approaches.

Mixed Motives

Title VII provides: "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex [pregnancy], or national origin was a motivating factor for any employment practice, *even though other factors also motivated the practice.*" 42 U.S.C. § 2000e-2(m) (emphasis added). Direct evidence of discrimination would be an admission on the part of ARC that Venturelli was not hired because she was pregnant. However, as here, employees must normally rely upon circumstantial evidence, which would include "suspicious timing, ambiguous statements oral or written, behavior toward or comments directed at other employees in the protected group, and other bits and pieces from which an inference of discriminatory intent might be drawn." *Troupe v. May Department Stores Company*, 20 F.3d 734, 736 (7th Cir. 1994). Even if a plaintiff shows that an employment decision was motivated in part by her pregnancy, "the defendant may avoid a finding of liability by proving that it would have made the same decision had the plaintiff not been pregnant." *Geier v. Medtronic, Inc.*, 99 F.3d 238, 241 (7th Cir. 1996) (citing *Troupe* at 737). The crux of Venturelli's discrimination claim is that she was not made an offer that would have allowed her to begin employment as the full-time administrative assistant *before* she left to deliver her baby. In other words, Venturelli claims pregnancy discrimination because ARC was conditioning the offer upon the completion of her pregnancy and subsequent recovery. However, as noted above, the basic principle

behind the PDA is that women affected by pregnancy and related conditions *must be treated the same* as other applicants and employees on the basis of their ability or inability to work. Venturelli made clear from the outset of her stint at ARC that she was going to leave in February to give birth to her child. She expressed interest in the full-time job, to be sure, but ARC was skeptical that she would return. ARC cannot be held liable for taking this approach: "Employers can treat pregnant women as badly as they treat similarly affected but non pregnant women, even to the point of 'conditioning the availability of an employment benefit on an employee's decision to return to work after the end of the medical disability that pregnancy causes.' " *Troupe* at 738 (citing *Maganuco v. Leyden Community High School Dist. 212*, 939 F.2d 440, 445 (7th Cir. 1991)). Venturelli has offered nothing which demonstrates that ARC treated Venturelli any differently than they would have treated a non-pregnant employee in her exact same situation (for example, a temporary employee interested in a full-time position, but who was about to leave work for an unspecified time due to an illness or medical condition.) Put differently, Venturelli has failed to establish that she was not offered the job while she was pregnant *merely because of ARC's bias toward pregnant women*. As the Seventh Circuit observed in *Maldonado*,

> Although the PDA was designed to allow individual women to make independent choices about whether to continue to work while pregnant, it was not

> designed to handcuff employers by forcing them to wait until an employee's pregnancy causes a special economic disadvantage. The PDA does not create such an artificial divide between pregnancy , childbirth and related medical conditions and the secondary effects of a pregnancy which might affect job performance.

Maldonado, 186 F.3d at 767. Ultimately, the most that can be inferred from the record before the Court is that ARC did not hire Venturelli while she happened to be pregnant because ARC did not think that Venturelli would return to work after she gave birth and recovered from her pregnancy. Without more, such a claim is simply not actionable under the PDA.

Also at play is the 520-hour service requirement. As noted above, at least part of ARC's rationale for not immediately hiring Venturelli when she expressed interest in the job was that she had not satisfied the 520-hour requirement. At a minimum, ARC's hiring authorities all *thought* that Venturelli was going to meet this requirement at or around late February, approximately the same time Venturelli was scheduled to leave work. ARC faced a penalty if it made Venturelli a full-time employee before this requirement was met. Venturelli argues that ARC was wrong in its estimation, and that she actually completed the service requirement on February 14, 2000. However, as ARC argues, it was difficult to project when Venturelli

would reach 520 hours because she worked irregular hours. In any event, for purposes ascertaining discriminatory intent or motive, all that matters is what ARC's hiring authorities *thought* when making the employment decision. Venturelli has offered nothing which suggests that the 520-hour requirement was used as a pretext for discrimination.

Venturelli offers more evidence. First, as outlined above, she claims that Collins made stereotypical and biased comments ("We know how you women are ...") about Venturelli's pregnancy on at least two separate occasions while discussing the job opening, and also that he "grilled her" about her employment plans after her pregnancy. However, the Seventh Circuit has held that statements expressing doubt that a woman will return to work full-time after having a baby do no constitute direct evidence of pregnancy discrimination. *See Ilhardt v. Sara Lee Corporation*, 118 F.3d 1151, 1155 (7th Cir. 1997) (citing *Troupe*).[9] Venturelli also claims that her conversation with Baldwin regarding pregnancy as a pre-existing condition under the terms of ARC's group health insurance coverage is evidence of discrimination. According to Baldwin, she called ARC's insurance agency and was informed that

---

[9] Also, on various occasions during her employment at ARC, Collins asked Venturelli questions about her pregnancy that related to the female character "Marge" in the movie Fargo, including: "Do you eat like the pregnant lady in Fargo?" and "Do you like to go to the buffets like the pregnant lady in Fargo?" PPFOF, ¶ 100. At best, these comments represent an inappropriate attempt at humor, not discriminatory animus

pregnancy was a pre-existing condition. This was admittedly incorrect.[10] However, it is not reasonable to infer that Baldwin was lying. Venturelli has no evidence to suggest that Baldwin *knew* she was conveying misinformation.[11] It is, in fact, more reasonable to infer the opposite: If Baldwin intended to lie to Venturelli, she would not bother calling someone to find out the "correct" answer.

In sum, Venturelli has no direct evidence of discrimination, and the circumstantial evidence, taken together, does not form "a convincing mosaic of discrimination against the plaintiff." *Troupe* at 737. Accordingly, Venturelli has failed to defeat summary judgment under the "mixed motive" approach to framing discrimination claims.

---

[10] Under Wis. Stat. § 632.746(2)(b), a group health insurance policy may not exclude coverage for pregnancy costs as a pre-existing condition.

[11] Venturelli also argues that because "it is reasonable to infer that an insurance agent would not give advice about insurance coverage that is contrary to state insurance law," PPFF, ¶ 164, it is reasonable to infer that Baldwin was lying. First of all, the proposition that insurance agents would not give erroneous or incorrect advice about insurance coverage is rather dubious. Insurance agents are not infallible human beings.
Furthermore, with regard to the conclusions that Baldwin was lying, as Judge Posner observed, "intent to discriminate is a mental state and mind reading [is] not an accepted tool o judicial inquiry." *Troupe* at 736.

McDonnell Douglas Burden-Shifting

The familiar *McDonnell Douglas* framework sets forth a three-part inquiry. First, the plaintiff must establish a prima facie case of discrimination; second, the defendant must articulate a legitimate, non-discriminatory reason for the adverse employment action; and third, the plaintiff must prove that the employer's proffered reason is merely a pretext for discrimination. *McDonnell Douglas*, 411 U.S. at 802-04. To state a prima facie case of discrimination, Venturelli must establish the following:

1. She was pregnant (a member of a protected class) and her employer knew she was pregnant,
2. She was performing her duties satisfactorily,
3. She was [subject to an adverse employment action], and
4. Similarly situated employees not in the protected class were treated more favorably.[12]

Ilhardt, 118 F.3d at 1154-55. As discussed above, Venturelli's claim is that ARC conditioned her full-time employment upon

---

[12] In the failure to hire context, this last requirement has received varying formulations. *See Heerdink v. Amoco Oil Co.*, 919 F.2d 1256, 1259 (7th Cir. 1990) (plaintiff must show that job remained open, and the employer continued to seek applicants from persons of the plaintiff's qualifications); *see also EEOC v. Our Lady of the Resurrection Med. Ctr.*, 77 F.3d 145, 148 (7th Cir. 1996) (employer filled position with a person not in the plaintiff's protected class, or the position remained open).

the completion of her pregnancy and subsequent recovery. Venturelli therefore implicitly concedes that she was offered the job: "ARC contends that Venturelli refused to accept a position with ARC. The truth is that Venturelli would have accepted a position if one had been offered to her that would have allowed her to start working during her pregnancy." Brief at 21. But simply because Venturelli was pregnant did not entitle her to special treatment: "The [PDA] does not, despite the urgings of feminist scholars, require employers to offer maternity leave or *take other steps to make is easier for pregnant women to work.*" *Troupe* at 738 (internal citation omitted) (emphasis added). Accordingly, because Venturelli was offered the job, she suffered no adverse employment action under the PDA. That the offer did not allow her to start when she wanted to start, or was not made in the manner or under the circumstances she would have preferred, is of no moment.[13]

Even if Venturelli's claim survived the prima facie case framework, ARC has articulated a legitimate, non-discriminatory motive for conditioning employment upon the completion of her pregnancy. *See Clay v. Holy Cross Hospital,* 253 F.3d 1000, 1005 (7th Cir. 2001) (citing *Bekker v. Humana Health Plan,*

---

[13] The Court also notes that Venturelli likely could not establish that similarly situated employees not in the protected class were treated favorably. In fact, ARC filled the position with Laura Schleif, a temporary employee *who was pregnant at the time ARC offered her the job. See* DPFOF, ¶ 99, 100, PR to same.

Inc., 229 F.3d 662, 672 (7th Cir. 2000). As described at length above, upon learning that Venturelli was interested in the permanent position, ARC did not extend an offer right away because ARC hiring authorities were not convinced that she would return after her recovery, and also because of the 520-hour service requirement. Furthermore, Venturelli cannot establish that ARC's justifications were merely a pretext for discrimination. *Id.* Accordingly, Venturelli's discrimination claim fails under the *McDonnell Douglas* burden-shifting framework.

CONCLUSION

The factual background giving rise to this claim ironically demonstrates that ARC *wanted* Venturelli as a full-time employee. Venturelli was upset with the way ARC treated her, but as the foregoing analysis demonstrates, the PDA does not entitle Venturelli to *better* treatment that other employees by virtue of her pregnancy. ARC's motion for summary judgment must therefore be granted.

NOW, THEREFORE, BASED ON THE FOREGOING, IT IS HEREBY ORDERED THAT:

1. Venturelli's Motion to File Amended and Supplemental Materials in Response to summary Judgment Motion is GRANTED;

2. Venturelli's Motion to Strike Defendant's Reply Concerning its Proposed Findings of Fact is GRANTED;

3. ARC's motion for summary judgment is GRANTED; and

4. This matter is DISMISSED.

Dated at Milwaukee, Wisconsin, this 2nd day of May, 2002.

SO ORDERED,

Hon. Rudolph T. Randa
U.S. District Judge

APPENDIX C

STATUTES INVOLVED

42 U.S.C. § 2000e-2(a) provides in relevant part:

> It shall be an unlawful employment practice for an employer--
>
> (1) to fail or refuse to hire ... any individual ... because of such individual's ... sex ....

42 U.S.C. § 2000e-2(m) provides in relevant part:

> Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that ... sex ... was a motivating factor for any employment practice, even though other factors also motivated the practice.

42 U.S.C. § 2000e(k) provides in relevant part:

> The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes ....

(2)

No. 03-1231

Supreme Court, U.S.
FILED
APR 1 - 2004
OFFICE OF THE CLERK

In The

Supreme Court of the United States

CELENA VENTURELLI,

Petitioner,

v.

ARC COMMUNITY SERVICES, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENT ARC COMMUNITY SERVICES, INC'S. BRIEF IN OPPOSITION

AMY O. BRUCHS
Counsel of Record
NIA ENEMUOH-TRAMMELL
MICHAEL BEST & FRIEDRICH LLP
1 S. Pinckney Street
P.O. Box 1806
Madison, Wisconsin 53701-1806
(608) 257-3501

BEST AVAILABLE COPY

QUESTIONS RESTATED

1. Whether review is warranted because the Seventh Circuit's decision conflicts with Court precedent and circuit decisions applying the "decisionmaker test" to employment discrimination cases?

2. Whether review is needed to examine the manner in which the Seventh Circuit analyzed the evidence on summary judgment?

3. Whether review is warranted to evaluate the manner in which the Seventh Circuit applied the prima facie standard under the indirect method of proof in employment discrimination cases?

4. Whether review is necessary because the Seventh Circuit's ruling that a job offer permitting a pregnant woman to begin employment after she delivers her baby is not, in itself, direct evidence of intentional discrimination conflicts with the Pregnancy Discrimination Act?

PARTIES TO THE PROCEEDING

All of the parties to this proceeding are identified in the caption of the case.

STATEMENT PURSUANT TO RULE 29.6

Respondent, ARC Community Services, Inc., has no parent corporation and no publicly held company that owns ten percent or more of its stock.

TABLE OF CONTENTS

	Page
QUESTIONS RESTATED	i
PARTIES TO THE PROCEEDING	ii
STATEMENT PURSUANT TO RULE 29.6	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
APPLICABLE STATUTORY PROVISIONS	1
COUNTERSTATEMENT OF THE CASE	2
REASONS FOR DENYING THE PETITION	6
I. THE CIRCUITS HAVE SUFFICIENT GUIDANCE IN DETERMINING WHEN AN INDIVIDUAL IS A DECISIONMAKER UNDER TITLE VII DISCRIMINATION CASES	7
A. The Court's Decision In *Reeves* Adequately Guides Lower Courts In Deciding When An Individual Is A Decisionmaker In Employment Discrimination Cases	7
B. The Circuit Decisions Are Consistent With Each Other	10
1. The *Venturelli* decision does not conflict with the "position in the company" cases cited by the Petitioner	11
2. The "influence" test cases cited by the Petitioner do not conflict with each other	13

TABLE OF CONTENTS – Continued

Page

a. *Venturelli* is distinguishable from the decisions rendered by the circuits identified by the Petitioner.. 13

b. The Third and Fifth Circuit's application of the "influence" test does not conflict with other circuit decisions 16

3. The *Venturelli* decision does not conflict with the Seventh Circuits' decision in *Oxman*..... 18

4. The Seventh Circuit's reluctance to apply the "atmosphere" test in *Venturelli* and *Swanson* does not create a conflict between the circuits 19

II. THE SEVENTH CIRCUIT CONSIDERED THE TOTALITY OF THE EVIDENCE IN CONCLUDING THAT RESPONDENT DID NOT INTENTIONALLY DISCRIMINATE AGAINST THE PETITIONER..... 21

III. THE SEVENTH CIRCUIT APPLIED THE PROPER TEST TO THE PETITIONER'S PRIMA FACIE CASE UNDER THE INDIRECT METHOD OF PROOF..... 24

IV. THE PDA DOES NOT REQUIRE PREFERENTIAL TREATMENT FOR PREGNANT WOMEN, ONLY EQUAL TREATMENT..... 26

CONCLUSION..... 30

TABLE OF AUTHORITIES

Page

CASES

Armstrong v. Flowers Hosp., Inc., 33 F.3d 1308 (11th Cir. 1994) 28

Bickerstaff v. Vassar College, 196 F.3d 435 (2d Cir. 1999) 16

Chuang v. University of California Davis, 225 F.3d 1115 (9th Cir. 2000) 23, 24

Conway v. Electro Switch Corp., 825 F.2d 593 (1st Cir. 1987) 20

EEOC v. Horizon/CMS Healthcare Corp., 220 F.3d 1184 (10th Cir. 2000) 14

Ercegovich v. Goodyear Tire & Rubber Co., 154 F.3d 344 (6th Cir. 1998) 15, 20

Evans v. City of Bishop, 238 F.3d 586 (5th Cir. 2000) 11, 12

Geduldig v. Aiello, 417 U.S. 484 (1974) 27

General Elec. Co. v. Gilbert, 429 U.S. 125 (1976) 27

Gleason v. Mesirow Fin., Inc., 118 F.3d 1134 (7th Cir. 1997) 23

Hunt v. City of Markhan, 219 F.3d 649 (7th Cir. 2000) 14, 15

Johnson v. Wolff's Clothiers, Inc., 663 F.2d 800 (8th Cir. 1981) 25

Mohr v. Dustrol, Inc., 306 F.3d 636 (8th Cir. 2002) 14

Morse v. Southern Union Co., 174 F.3d 917 (8th Cir. 1999), *cert. denied*, 527 U.S. 1059 (1999) 12

Oxman v. WLS-TV, 846 F.2d 448 (7th Cir. 1988) 18, 19

TABLE OF AUTHORITIES – Continued

Page

Pivirotto v. Innovative Systems, Inc., 191 F.3d 344 (3d Cir. 1999) 17, 18

Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133 (2000) ..... *passim*

Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70 (1955) 6

Rios v. Rossotti, 252 F.3d 375 (5th Cir. 2001) 20

Rubinstein v. Administrators of the Tulane Educational Fund, 218 F.3d 392 (5th Cir. 2000) 16

Russell v. McKinney Hosp. Venture, 235 F.3d 219 (5th Cir. 2000) 17

Santiago-Ramos v. Centennial P.R. Wireless Corp., 217 F.3d 46 (1st Cir. 2000) 13

Swanson v. Leggett & Platt, Inc., 154 F.3d 730 (7th Cir. 1998) 12, 20, 21

Troupe v. May Dept. Stores Co., 20 F.3d 734 (7th Cir. 1994) 22, 27

STATUTES

Family and Medical Leave Act of 1993, 29 U.S.C. § 2601 29

29 U.S.C. § 2611 29

29 U.S.C. § 2611(2)(A) 2

29 U.S.C. § 2612(1) 2

42 U.S.C. § 2000e(k) 2, 26, 27

42 U.S.C. § 2000e-2(a) 1

42 U.S.C. § 2000e-2(m) 1

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

Laura T. Kessler, *The Attachment Gap: Employment Discrimination Law, Women's Cultural Caregiving, and the Limits of Economic and Liberal Legal Theory*, 34 U. Mich. J.L. Ref. 371, 374-98 (2001) 29

Pub. L. No. 95-555, 92 Stat. 2076 (1978) 27

S. Rep. No. 95-331 (1977) 28

Robert L. Stern, *Supreme Court Practice* 226 (8th ed. 2002) 10

OPINIONS BELOW

The unpublished opinion of the United States District Court for the Eastern District of Wisconsin appears in Appendix B of the Petition for Writ of Certiorari (the "Petition"). The United States Court of Appeals for the Seventh Circuit's (the "Seventh Circuit") initial decision, which is reported at 336 F.3d 606, was withdrawn. The Seventh Circuit issued a subsequent decision, which is reported at 350 F.3d 592 and appears in Appendix A of the Petition.

JURISDICTION

The Respondent acknowledges that the Petition was timely filed.

APPLICABLE STATUTORY PROVISIONS

42 U.S.C. § 2000e-2(a)

> It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire . . . or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex. . . .

42 U.S.C. § 2000e-2(m) provides in pertinent part:

> Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

42 U.S.C. § 2000e(k) provides in pertinent part:

> The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise. . . .

29 U.S.C § 2611(2)(A) provides in pertinent part:

> **In general**. The term "eligible employee" means an employee who has been employed – (i) for at least 12 months by the employer with respect to whom leave is requested under section 2612 of this title; and (ii) for at least 1,250 hours of service with such employer during the previous 12-month period.

29 U.S.C § 2612(1) provides in pertinent part:

> **Entitlement to leave**. Subject to section 2613 of this title, an eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period for one or more of the following: (A) Because of the birth of a son or daughter of the employee and in order to care for such son or daughter. . . .

COUNTERSTATEMENT OF THE CASE

Not only is the Petitioner's Statement of the Case editorialized, she takes liberties with the recitation of the

facts. Thus, this Counterstatement of the Case is necessary to provide the Court with a more complete statement of the case.

ARC Community Services, Inc. (the "Respondent") is a non-profit organization operating in the State of Wisconsin, which is dedicated to providing services to women who are in the criminal justice system, women with problems of substance abuse, and pregnant women. (Dkt. 1, Answer ¶ 2; Dkt. 10, Kinsey Dep. p. 24). Karen Kinsey ("Kinsey") is Respondent's Executive Director. (Dkt. 10, Kinsey Dep. p. 25). In addition to providing supervision to employees, Kinsey is responsible, along with the Assistant Director and the Program Services Director, for hiring and training new staff. (Dkt. 10, Kinsey Dep. pp. 25-32; Exh. 1 of Kinsey Dep.). She supervises Judy Baldwin ("Baldwin"), Respondent's Assistant Director, and Michael Collins ("Collins"), Respondent's controller. (Dkt. 10, Baldwin Dep. p. 7; Collins Dep. p. 5). Pursuant to Respondent's personnel and policy procedure manual, Kinsey is ultimately responsible for hiring and firing Respondent's employees. (Dkt. 10, Kinsey Dep. p. 29).

Celena Venturelli (the "Petitioner") began working at Respondent's administrative office as a temporary receptionist on October 19, 1999 through an assignment from Adecco, an employment placement agency. (Dkt. 10, Venturelli Dep. pp. 7, 21-22, 29, Exh. 2.). At the time Petitioner began her temporary employment with the Respondent, she was visibly pregnant, and she openly discussed her pregnancy with Respondent's staff and employees. (Dkt. 10, Stanley Dep. pp. 10-12). Her baby was due in March, 2000. (Dkt. 10, Venturelli Dep. p. 71). As a temporary employee, the Petitioner reported to Collins when she needed time off from work. (Dkt. 10, Venturelli Dep. p. 23). Collins did not have authority to reprimand Respondent's temporary and permanent clerical staff for poor performance, tardiness or absenteeism. (Dkt. 10, Kinsey

Dep. p. 27; Collins Dep. pp. 32-33). Also, he did not have authority to hire or fire permanent clerical staff. (Dkt. 10, Kinsey Dep. pp. 33-36; Collins Dep. pp. 21-22).

Respondent began advertising for an administrative assistant in November, 1999. (Dkt. 10, Kinsey Dep. p. 46; Venturelli Dep. p. 30). Kinsey, became aware that the Petitioner was interested in the administrative assistant position in November or December 1999. (Dkt. 10, Kinsey Dep. pp. 49-50, 56). Although Respondent received numerous resumes for the position, regret letters were sent to applicants in the winter of 1999. (Dkt. 10, Venturelli Dep. pp. 31-32). In January, 2000, Kinsey instructed Baldwin and Collins that she wanted Petitioner hired as soon as she completed a 520-hour service requirement imposed by Adecco. (Dkt. 10, Kinsey Dep. pp. 8, 11-16; Baldwin Dep. p. 30). Kinsey herself followed up with Petitioner on January 14, 2000, by calling and informing her that Respondent would like to hire her as an employee, and that they should attempt to work something out. (Dkt. 10, Venturelli Dep. pp. 40, 44; Exh. 8 of Venturelli Dep.; Kinsey Dep. pp. 56-57).

Some time after the January, 2000 staff meeting Collins discussed the administrative assistant position with Petitioner. (Dkt. 10, Collins Dep. p. 67). In February, 2000, Baldwin met with Petitioner and offered her the administrative assistant position. (Dkt. 10, Baldwin Dep. pp. 42-44). Baldwin asked Petitioner if she wanted to accept the administrative assistant position. (Dkt. 10, Baldwin Dep. p. 44). Baldwin did not specify a starting date because Petitioner did not state if she wanted the job. (Dkt. 10, Baldwin Dep. pp. 45-46). Petitioner did not immediately accept the administrative assistant position. (Dkt. 10, Baldwin Dep. p. 44). She never told Baldwin that she wanted to start the position before she had her baby. (Dkt. 10, Baldwin Decl., dated 2/28/02, ¶ 5; Venturelli Dep. Exh. 3; Dkt. 1, Compl.).

During the meeting Baldwin also discussed salary and benefits information with the Petitioner, including the availability of health insurance coverage for pregnant employees. (Dkt. 10, Baldwin Dep. pp. 42-43). Unsure of the answer to the health insurance issue, Baldwin, in Petitioner's presence, called Respondent's insurance agency and was informed by a person there that pregnancy would be a pre-existing condition. (Dkt. 10, Baldwin Dep. pp. 42-43; Venturelli Dep. p. 52). Based on the information provided to Baldwin by Respondent's insurance agent, Baldwin told Venturelli that it would not be to her advantage to begin employment before she gave birth to her baby. (Dkt. 10, Baldwin Dep. pp. 46-48; Venturelli Dep. pp. 51-52). Baldwin was unaware at the time she received this information that it was false. (Dkt. 10, Baldwin Dep. pp. 47-48). Baldwin later learned that the person she spoke with at the insurance agent's office misinformed her that pregnancy was a preexisting condition. (Dkt. 10, Baldwin Dep. pp. 46-48).

After Baldwin offered Petitioner the administrative assistant position and before the Petitioner's last day working for Respondent, Kinsey instructed Collins to inform the Petitioner that Respondent was still interested in hiring her, that the position would be held open for her, and that she should notify Respondent about when she would return to the agency. (Dkt. 10, Kinsey Dep. pp. 20, 76). In February, 2000, Collins informed Petitioner that the job was available to her. (Dkt. 10, Collins Dep. p. 74). Respondent stopped advertising for the administrative assistant position after discussing the position with Petitioner. (Dkt. 1, Complaint ¶ 13; Answer ¶ 13).

Petitioner's last day working for Respondent was February 24, 2000. Although the Petitioner completed the 525-hour service requirement on February 10, 2000, the Respondent did not become aware of this fact until after the Petitioner left its employ. (Dkt. 10, Collins Decl., ¶ 5,

dated 2/1/02; Exh., 2 of Collins Decl., dated 2/28/02; Exh. 2 of Venturelli Dep.).

After Petitioner's last day with Respondent, various employees of the Respondent telephoned her and left messages on her answering machine about when she intended to return and fill the administrative assistant position. (Dkt. 10, Venturelli Dep. pp. 77-79; Collins Dep. pp. 88-90, 93; Stanley Dep. p. 28; Kinsey Dep. pp. 80-89; Exh. 1 of Collins Decl.). The Petitioner did not return any of their phone calls. (Dkt. 10, Venturelli Dep. p. 79; Collins Dep. pp. 93-94; Collins Dec., Exh. 1; Stanley Dep. p. 28; Kinsey Dep. pp. 80-81). Although Respondent never heard back from the Petitioner, the agency filled the receptionist position held by Petitioner with three employees that were not "temp-to-hire" because it anticipated that the Petitioner would return and fill the administrative assistant position. (Dkt. 10, Collins Dep. pp. 60, 94-95; Exh. 4, 6-7 of Collins Dep.; Stanley Dep. pp. 28-30). Respondent eventually hired another temporary employee on a permanent basis to fill the position. (Dkt. 10, Schleif Dep. p. 5, dated 2/15/02; Exh. 7 of Collins Dep.). That employee was offered the position while she was visibly pregnant. (Dkt. 10 Kinsey Dep. p. 85; Stanley Dep. p. 2).

REASONS FOR DENYING THE PETITION

The Petition for Writ of Certiorari fails to identify any issue making this case an appropriate one for review under Rule 10 of the Supreme Court Rules. In *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 79 (1955), this Court stated that certiorari should not be granted "except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals." This case falls

far below the Court's standard for granting review, and the Petition should be denied.

I. THE CIRCUITS HAVE SUFFICIENT GUIDANCE IN DETERMINING WHEN AN INDIVIDUAL IS A DECISIONMAKER UNDER TITLE VII DISCRIMINATION CASES.

The Petitioner implores the Court to accept review of this case so that it may clarify when an individual is a "decisionmaker" under Title VII. (Petition for Writ of Certiorari, pp. 9-18, hereinafter Pet., at ___). The Petitioner argues that the lower courts have "inconsistently" applied various tests used by the circuits in deciding whether someone is a decisionmaker. *Id.* The Petitioner's attempt to portray dissonance between the various tests used by the circuits is nothing more than a ruse that should not sway this Court to grant certiorari. The circuits have sufficient guidance to determine whether an individual is a decisionmaker in the context of an employment discrimination case. Moreover, the Petitioner's argument that the circuits have inconsistently applied the applicable tests is illusory. This is evidenced by her utter failure to identify any true inconsistency in the manner that the circuits have interpreted and applied existing Court precedent.

A. The Court's Decision In *Reeves* Adequately Guides Lower Courts In Deciding When An Individual Is A Decisionmaker In Employment Discrimination Cases.

At best, the Petitioner's first argument fails to appreciate the value and impact of existing Court precedent evaluating whether a person is a decisionmaker under Title VII. The Court's decision in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 151-53 (2000), addresses

whether an employer could be liable in a disparate treatment case for the discriminatory animus harbored by a supervisory employee. In resolving *Reeves,* the Court defined the general parameters of when a supervisor's discriminatory animus would be sufficiently probative of an employer's intent to discriminate.

Reeves sued his former employer claiming that the president of the company terminated him because of his age in violation of the Age Discrimination in Employment Act. *Id.* at 137-38. At trial, Reeves presented evidence that his supervisor had made ageist remarks, including a comment that Reeves was too "old to do his job." *Id.* at 151. Reeves also offered evidence that his supervisor, who was the president's husband, recommended the termination. *Id.* The president attempted to rebut Reeves' claims by testifying that she fired him because he falsified company pay records. *Id.* at 152. The Fifth Circuit found that the supervisor's comments were merely stray remarks because they were not made in the direct context of Reeves' termination. *Id.* at 152-53.

On review, this Court disagreed. *Id.* The Court concluded that there was sufficient evidence for the jury to find that the employer intentionally discriminated because the supervisor was motivated by discriminatory animus and he was principally responsible for Reeves' termination. *Id.* The Court relied on evidence that the supervisor, who was married to the official decisionmaker, wielded "absolute power" within the company and employees feared him. *Id.* at 152. *Reeves* instructs the lower courts that a supervisory actor, albeit not the official decisionmaker, may still be deemed a de facto decisionmaker if there is sufficient evidence that he infected the decisionmaking process with his discriminatory animus.

Petitioner cites various pre-*Reeves* and post-*Reeves* cases to demonstrate that the lower courts lack guidance in interpreting *Reeves*.[1] However, merely pointing to distinctions in the language used by the circuits to describe the decisionmaker test does not establish that the various standards conflict. Notably, the Petitioner cites to the pre-*Reeves* cases without demonstrating that the approach employed by each circuit in applying the decisionmaker test remains viable in light of *Reeves*. Even if the Petitioner had made such a showing, the pre-*Reeves* cases that she relies upon show that the approaches taken by these circuits are in harmony with *Reeves*. Similarly, the different approaches used by the circuits in the post-*Reeves* cases are consistent with *Reeves*. All of these cases demonstrate that in evaluating whether an individual is a decisionmaker, the circuits scrutinize the evidence to determine who actually made or influenced the decision, regardless of title or the employer's arguments as to who "officially" made a decision. Regardless of the label Petitioner slaps on each of the approaches used by the circuits, each test rests on the same principles articulated by the Court in *Reeves*.

The Court was perhaps acting prophetically in *Reeves* by articulating a flexible test for deciding when an individual is a decisionmaker in the context of an employment discrimination case. Entertaining the Petitioner's request to define a more rigid, formulistic test would undoubtedly create confusion in the circuits, not remedy any purported

---

[1] Based on the cases cited by the Petitioner, all of the identified circuits apparently use the approach she labels as the "influence test". The Fifth, Seventh and Eighth Circuits have also applied what she has dubbed as the "position in the company" test. Finally, the cited cases indicate that pre-*Reeves*, the First and Sixth Circuits also applied what she calls the "atmosphere test" and that the Seventh Circuit applied what she describes as the "agency test".

confusion. A rigid test could not effectively or fairly be applied to every employer and the managing framework they choose to implement.

For the Petitioner to now argue that the circuits have been misguided with respect to the decisionmaker test is telling. In the lower court, she embraced and exploited the tests applied by the circuits to support her discrimination case. She never charged that any of the tests conflicted with *Reeves* or the law of any other circuit. Having lost on each theory, she now seeks to change the legal landscape to ensure her victory. She cannot have it both ways. The general rule articulated in *Reeves* about when an individual is a decisionmaker under Title VII is a sound approach, which permits the lower courts to adapt the standard to the specific facts of the case being decided. Because there is no evidence that the lower courts are confused in their interpretation of *Reeves*, there is no need for the Court to refine or clarify the *Reeves* decision.

B. The Circuit Decisions Are Consistent With Each Other.

The Petitioner also argues that there is conflict among the circuits in their application of the decisionmaker test. (Pet., 11-19). A conflict arises in the context of certiorari decisions when "two courts have decided the same legal issue in opposite ways, based on their holdings in different cases with very similar facts." Robert L. Stern, *Supreme Court Practice* 226 (8th ed. 2002). Although the Petitioner cites to a litany of cases to support her argument that the circuits' decisions are in disarray, she has not identified any true inconsistencies in the circuits' application of the decisionmaker test. *Id.* The different results in those cases are attributable to the different facts presented to the circuits.

1. The *Venturelli* decision does not conflict with the "position in the company" cases cited by the Petitioner.

The Petitioner faults the Seventh Circuit for not holding that Collins' position within the company rendered him the actual decisionmaker in the decision to hire her. (Pet. at 12). The Seventh Circuit found that it was not enough for the Petitioner to show that Collins was part of Respondent's management team and that he provided input to Kinsey, the official decisionmaker, about applicants' qualifications. *Venturelli v. ARC Community Services, Inc.*, 350 F.3d 592, 600 (7th Cir. 2003) (slip op. at 9-10). She must show that Collins influenced Kinsey not to hire the Petitioner. *Id.* Because the only evidence demonstrated that Collins influenced Kinsey to actually offer the position to Petitioner, the court found that Collins was not a decisionmaker. *Id.* Petitioner argues that *Venturelli* is inconsistent with decisions rendered by the Fifth and Eight Circuits. (Pet., at 12).

In the decisions cited by the Petitioner, the courts reached different results than *Venturelli* because they were faced with different facts. For example, in *Evans v. City of Bishop*, 238 F.3d 586, 588 (5th Cir. 2000), the City of Bishop city council took an adverse employment action against the plaintiff by approving the mayor's decision to hire an applicant other than the plaintiff. One of the city council members had made racist remarks and had worked to defeat the plaintiff, a former council member, in his re-election campaign. *Id.* at 588-92. Relying on *Reeves*, the Fifth Circuit found this evidence was probative of whether the employer's true motive for not hiring the plaintiff was discriminatory. *Id.* at 591 n.11. The court reached a different outcome than *Venturelli* because there was evidence that the council member may have influenced the employer not to hire the plaintiff.

Petitioner's other case, *Morse v. Southern Union Co.*, 174 F.3d 917, 920-23 (8th Cir. 1999), *cert. denied*, 527 U.S. 1059 (1999), involved a situation where the plaintiff alleged he was fired because of his age. There, the president of the company held a meeting with supervisors and encouraged them to replace older employees with younger employees. *Id.* at 920-21. The plaintiff's supervisor, who had attended this meeting, later terminated the plaintiff. *Id.* at 921. There was also evidence that the supervisor had made ageist remarks to the plaintiff. *Id.* The court found that the jury reasonably could have inferred that the president's comments motivated the supervisor to terminate the plaintiff. *Id.* at 923. As with *Evans*, this case is distinguishable from *Venturelli* because there was evidence that the president may have influenced the supervisor to fire the plaintiff. Moreover, the president, unlike Collins, was so high up in the chain of command that his ability to influence subordinates was hardly negligible. *Id.* at 922.

Although the Petitioner claims that the Seventh Circuit departed from its use of the "position in the company" test, the *Venturelli* court properly declined to use this test to find that Collins was a decisionmaker.[2] There is no evidence that Collins, by virtue of his position within the Respondent agency, influenced Kinsey not to hire the Petitioner.

---

[2] In the case referenced by the Petitioner, *Swanson v. Leggett & Platt, Inc.*, 154 F.3d 730 (7th Cir. 1998), the Seventh Circuit alluded to the "position in the company" test, but declined to find that a former high-ranking official influenced the official decisionmaker's decision to fire the plaintiffs. *Id.* at 733.

2. The "influence" test cases cited by the Petitioner do not conflict with each other.

Equally unavailing is the Petitioner's argument that the circuits have inconsistently applied the "influence" test to decisionmaker cases. She notes that the First, Sixth, Eighth, Seventh and Tenth Circuits have applied this test and reached different results from decisions rendered in other cases. (Pet., 13-15). Petitioner once again ignores critical factual distinctions, which warranted the outcomes of each of these cases.

a. *Venturelli* is distinguishable from the decisions rendered by the circuits identified by the Petitioner.

In all the cases that Petitioner claims support a different result in *Venturelli*, the courts had good reason to find that the subordinates had the requisite amount of influence on the decisionmaking process to be labeled de facto decisionmakers. For example, in *Santiago-Ramos v. Centennial P.R. Wireless Corp.*, 217 F.3d 46, 50-52, 55 (1st Cir. 2000), the court found that a jury could view the employer's proffered reasons for terminating the plaintiff were pretextual where both the "key" decisionmaker and the plaintiff's supervisor made sexist comments to the plaintiff. The court noted that the supervisor was in a position to influence the "key" decisionmaker because he had daily discussions with the key decisionmaker during a significant phase for the company when the plaintiff worked at the company. *Id.* at 55. Furthermore, the "key" decisionmaker asked for the supervisor's opinion when deciding whether to fire the plaintiff. *Id.* Just two weeks prior to this, the "key" decisionmaker had no intention of terminating the plaintiff. *Id.* In *Venturelli*, there is no evidence that Kinsey, the "key" decisionmaker, harbored any discriminatory animus against pregnant women. *Venturelli*, 350 F.3d at 600-601 (slip op. at 9-10). Also, as

discussed above, the evidence only reveals that Collins influenced her to hire the Petitioner. *Id.*

The second case cited by the Petitioner, *Mohr v. Dustrol, Inc.*, 306 F.3d 636 (8th Cir. 2002) is also easily distinguished. The evidence in *Mohr* revealed that the plaintiff's supervisor harbored discriminatory animus. *Id.* at 639-41. On summary judgment, the employer tried to divorce the supervisor from the decisionmaking process by arguing that others made the official decision to terminate the plaintiff. *Id.* However, the court found that official decisionmakers merely "deferred" to the supervisor in their decision to fire the plaintiff. *Id.* The *Venturelli* case is different because there is no evidence that Kinsey "deferred" her decision to Collins or that Collins influenced her not to hire the Petitioner.

Likewise, the Petitioner's reliance on *EEOC v. Horizon/CMS Healthcare Corp.*, 220 F.3d 1184 (10th Cir. 2000) is also misplaced. The evidence there showed that the supervisors, who allegedly made sexist remarks, had "unilateral" power to take the adverse employment action they took against the plaintiffs. *Id.* at 1199, n.12. This simply was not the case in *Venturelli.* Collins lacked authority to take any sort of adverse employment action against the Petitioner. *Venturelli*, slip op. at 9.

As with all of these other cases, the facts of *Hunt v. City of Markhan*, 219 F.3d 649, 651-53 (7th Cir. 2000) compelled a different result than the one reached in *Venturelli*. In *Hunt*, the mayor and other city officials, who were mostly black, allegedly repeated racist remarks targeted at white police officers employed by the City. *Id.* at 652. At a city council meeting, the mayor commented that the white officers were "not worth anything". *Id.* When pressed about the comment, the mayor suggested that he made the comments only because the officers were white. *Id.* The plaintiffs sued the City, complaining that they were denied raises because of their race, and that one

of them was constructively discharged upon learning from the police chief that he would never meet the mayor's expectations. *Id.* The Seventh Circuit found that, although the mayor did not vote at city council meetings, he recommended actions to them, including whether city employees deserved raises. *Id.* at 653. The court found that the mayor's comments became evidence of discrimination because they arose from a source that influenced the employer to deny raises to the plaintiffs. *Id.* In our case, Collins' impact in the decisionmaking process only encouraged Kinsey to hire the Petitioner.

Finally, the Petitioner claims that the Fifth Circuit's decision in *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344 (6th Cir. 1998) conflicts with *Venturelli*. It does not. In *Ercegovich,* the plaintiff sued his employer after his job was eliminated, claiming that the decision was motivated by his age. *Id.* at 349-50. The plaintiff presented evidence that several high-ranking officials made ageist comments. *Id.* at 354. Her offer of proof included evidence that the vice president had a preference for younger employees and wanted to see older employees retire. *Id.* The employer tried to separate the vice president's comments from the actions of the employer's human resources department, which officially made the decision to eliminate the plaintiff's position. *Id.* at 355. However, the court found that the vice president's comments supported an inference of discriminatory intent. *Id.* at 356. This outcome is not surprising because the vice president gave input into the decisionmaking process, and he was a high ranking company official to whom the head of the human resources reported. *Id.* at 355. He was undoubtedly in a position to influence the human resources department to eliminate the plaintiff's position. In the *Venturelli* case, though, Collins was subordinate to Kinsey, and there was no evidence that he influenced her not to hire the Petitioner.

As amply demonstrated, the cases cited by the Petitioner fail to demonstrate that the *Venturelli* decision conflicts with other circuit decisions.[3] Indeed, these cases only confirm that the Seventh Circuit reached the correct decision about whether Collins was a decisionmaker.

b. The Third and Fifth Circuits' application of the "influence" test does not conflict with other circuit decisions.

The Petitioner also argues that the Third and Fifth Circuits' "rejection" of the influence test creates a conflict worthy of the Court's review of this case. This purported conflict is not only elusive, it is immaterial to the outcome of the *Venturelli* case.

The Fifth Circuit refused to apply the "influence" test in *Rubinstein v. Administrators of the Tulane Educational Fund,* 218 F.3d 392 (5th Cir. 2000), for good reasons. In a subsequent case, the court explained its decision and reconciled *Rubinstein* with its jurisprudence on the test. Essentially, the court found that the plaintiff fell into an exception created by *Reeves*:

---

[3] The Petitioner also cites to *Bickerstaff v. Vassar College*, 196 F.3d 435, 450 (2d Cir. 1999) for the proposition that even absent bias on the part of the decisionmaker, a biased nondecisionmaker may nonetheless taint the decisionmaking process if he played a role in that process. Even *Bickerstaff* supports the Seventh Circuit's decision that it is not enough for a plaintiff to merely show that the nondecisionmaker played a role in the decisionmaking process. There, the court found that the biased comments of a student who helped prepare a report on the plaintiff's entitlement to a promotion was not evidence of the employer's discriminatory intent. *Id.* at 450-51. The court found that the student did not play a meaningful role in the employer's decision to deny the plaintiff the promotion. *Id.* This is consistent with the Seventh Circuit's admonition that Petitioner must show more than evidence that Collins was a "member" of the Respondent's management team.

> [the] evidence . . . was so overwhelming as to make summary judgment for the employer appropriate in spite of evidence of discriminatory animus in the form of remarks that the plaintiff wholly failed to tie to any potentially relevant time frame. . . . *Rubinstein* stands only for the proposition that an overwhelming case that the adverse employment actions at issue were attributable to a legitimate, nondiscriminatory reason will not be defeated by remarks that have no link whatsoever to any potentially relevant time frame. Were we to read more into *Rubinstein* in this regard, it would be in direct conflict with *Reeves*.

Russell v. McKinney Hosp. Venture, 235 F.3d 219, 229 n.19 (5th Cir. 2000).[4] The court's decision in *Rubinstein* was clearly justified by the facts of that case and it by no means conflicts with other circuit precedent.

Similarly, the Petitioner has failed to show that the pre-*Reeves* decision *Pivirotto v. Innovative Systems, Inc.*,

---

[4] In *Russell*, the court found that a jury could have found that a manager, who allegedly made ageist comments, was principally responsible for the plaintiff's termination even though he was not the official decisionmaker. The court found that the manager wielded enough influence to impact the decision to terminate the plaintiff. *Id.* at 228. The court reached this conclusion after considering the following evidence: (1) the manager's father was the Chief Executive Officer ("CEO") of the company; (2) the official decisionmaker's budget was controlled by the CEO; (3) the manager unilaterally transferred another employee, whom the official decisionmaker supervised, without the decisionmaker's knowledge or consent; (4) after the manager informed the official decisionmaker that he would quit if she did not fire the plaintiff, the official decisionmaker cried to her assistant about the comment; and (5) the official decisionmaker told the plaintiff that she did not want to lose her job over the tension between the manager and the plaintiff. *Id.* at 228. On these facts, *Russell* is clearly distinguishable from *Venturelli*.

191 F.3d 344 (3d Cir. 1999) is inconsistent with other circuit cases. There, the court refused to find that the sexist remarks allegedly made by the chairman of a company, who was the official decisionmaker, evidenced the employer's intent to discriminate. *Id.* at 348-49, 359. The chief operating officer, whom the chairman hired to run the day-to-day operations of the company, terminated the plaintiff. *Id.* at 349. The court found that the chairman merely ratified this decision. *Id.* at 359. In so holding, the court noted that the chairman initially agreed to hire the plaintiff to a top position within the company, and that he expressed interest in salvaging the situation and retaining the plaintiff as an employee. *Id.* None of the other cases cited by the Petitioner involved facts demonstrating that the official decisionmaker made inquiries to determine whether it was feasible to retain the employee.

3. The *Venturelli* decision does not conflict with the Seventh Circuit's decision in *Oxman*.

There is also no conflict between *Venturelli* and *Oxman v. WLS-TV,* 846 F.2d 448, 456-457 (7th Cir. 1988), a pre-*Reeves* case decided by the Seventh Circuit. The Petitioner argues that the *Venturelli* court erred by not following *Oxman* and finding that Collins' remarks could have been imputed to the Respondent because he carried out the employment decision. (Pet., at 15). In addition to failing to show that the court's reasoning in *Oxman* survived the *Reeves* decision, the Petitioner ignores the factual differences between *Oxman* and *Venturelli*.

In *Oxman*, the only person who communicated with the plaintiff regarding his termination was a subordinate to the actual decisionmaker and that communication came after the decision to terminate the plaintiff had been made. *Oxman,* 846 F.2d at 456-57. Under those circumstances, the court determined that it was reasonable to

infer that the reasons given by the subordinate were those authorized by the decisionmaker. *Id.* However, those are not the facts in this case. The evidence in *Venturelli* showed that Baldwin offered the job to Petitioner while she was still pregnant and, as the Seventh Circuit found, there was no direct evidence of discrimination on her part. *Venturelli*, 350 F.3d at 597-99 (slip op. 4-6, 8). Moreover, Collins' discussions with Petitioner regarding her pregnancy occurred before the offer by Baldwin, not after, like in *Oxman*. *Id.* Indeed, it would be illogical to impute an alleged discriminatory intent by Collins to Kinsey, when Baldwin offered the job to the Petitioner at a later time but while she was still pregnant.[5]

4. The Seventh Circuit's reluctance to apply the "atmosphere" test in *Venturelli* and *Swanson* does not create a conflict between the circuits.

The Petitioner's last argument on the conflicts issue is that the Seventh Circuit's decisions in *Venturelli* and *Swanson v. Leggett & Platt, Inc.*, 154 F.3d 730 (7th Cir. 1998), conflict with cases from the First and Sixth Circuit that apply what she calls the "atmosphere" test. (Pet., at

---

[5] The Petitioner suggests that the court also erred by making a credibility determination in discrediting Collins' testimony that Kinsey only authorized him to offer the Petitioner a job that permitted her to begin working after she delivered her baby. (Pet., at 15). Even if the Court accepted her argument on this issue, it is entirely immaterial to the issue of whether this Court should accept this case for review. As the Seventh Circuit found, an offer of employment to a pregnant woman starting sometime after she delivers her baby is not, standing alone, evidence of discriminatory intent on the part of the employer. Thus, whether the court believed Kinsey's testimony that she authorized a job offer with an immediate start date over Collins' testimony is irrelevant to the Court's inquiry.

16-17). This argument fails just like the others. Both of these pre-*Reeves*[6] cases are easily distinguished from the Seventh Circuit cases.

In *Conway v. Electro Switch Corp.*, 825 F.2d 593, 596-98 (1st Cir. 1987), the evidence revealed that when two female employees approached each of their managers to discuss a raise, each manager allegedly made sexist remarks and denied the raises. The court found that this occurrence was probably not just coincidence, and could be probative of the employer's "corporate state-of-mind". In *Ercegovich*, the court found that isolated ageist comments by senior officials, coupled with numerous ageist remarks by other highly-ranked individuals employed by the employer might reflect a "cumulative managerial attitude" among the employer's managers. *Ercegovich*, 154 F.3d at 356-57.

The Petitioner has not shown that a similar environment existed at Respondent's workplace. This is precisely the reason the court reached a different result in *Venturelli*. Furthermore, the Seventh Circuit properly reached

---

[6] The Fifth Circuit's decision in *Rios v. Rossotti*, 252 F.3d 375, 378-380 (5th Cir. 2001) demonstrates how the circuits can easily reconcile the "atmosphere" test and the standard articulated in *Reeves*. The plaintiffs in *Rios* offered affidavits that suggested that their employer had an atmosphere that was hostile to Hispanic employees as evidence of discrimination. *Id.* at 379. Although the court acknowledged that this evidence could "evince a pattern of discrimination sufficient" to rebut the employer's stated reasons for the employment decision, it ruled that under *Reeves*, the plaintiffs had to establish that the comments were made by those who were principally responsible for the adverse employment decision. *Id.* at 379. The court then concluded that the strongest evidence presented by the plaintiffs failed to show that any of the comments alleged in one of the affidavits could be attributed to the decisionmakers. *Id.* The court also found that a rational jury could not conclude that the comments were made by anyone who had influence over the decisionmakers. *Id.*

the conclusion it did in *Swanson*. There, the plaintiff's only evidence of the employer's alleged discriminatory atmosphere was a comment made by a lower level supervisor, who frequented the same bar as company officials accused of harboring discriminatory animus. *Swanson*, 154 F.3d at 733. That supervisor told the plaintiff that the employer was going to terminate all of its older employees. *Id.* The court properly rejected plaintiff's specious argument, concluding that the evidence that the supervisor may have socialized with company officials did not show that she had knowledge of the decisionmaker's motives for terminating the plaintiff. *Id.* at 734.

The Petitioner elides critical distinctions in the cases she claims are in conflict. Once those distinctions are properly analyzed it is clear that the cited lower court decisions are in harmony with *Reeves* and each other. The Court should not grant certiorari to resolve the invented conflicts the Petitioner claims pervades the circuits.

II. THE SEVENTH CIRCUIT CONSIDERED THE TOTALITY OF THE EVIDENCE IN CONCLUDING THAT RESPONDENT DID NOT INTENTIONALLY DISCRIMINATE AGAINST THE PETITIONER.

The Petitioner's second argument in support of review concerns whether the Seventh Circuit correctly applied the "totality of the evidence" standard in granting summary judgment in favor of the Respondent. She maintains that the court failed to consider the totality of the evidence by not properly considering the aggregate impact of the direct and circumstantial evidence she presented for her direct method case. (Pet., at 24-27). The Petitioner, however, has failed to demonstrate that the Seventh Circuit's approach here warrants certiorari review.

In the lower courts, the Petitioner elected to prove her discrimination case using both the direct and indirect

methods of proof. The Seventh Circuit has adopted a rule that permits plaintiffs to prove their direct method case by using direct evidence or a mosaic of circumstantial evidence to build "direct" evidence of discrimination. *Venturelli,* 350 F.3d at 601 (slip op. 12) (citing *Troupe v. May Dept. Stores Co.*, 20 F.3d 734, 736 (7th Cir. 1994)). For her direct method case, the Petitioner not only presented direct evidence, but she offered other evidence that she claimed added up to direct evidence of discriminatory intent. *Venturelli,* 350 F.3d at 601 (slip op. 11). After reviewing the evidence, and drawing all reasonable inferences in favor of the Petitioner, the court concluded that none of the evidence it considered amounted to direct evidence of discrimination.

Specifically, the court found that even though Collins testified that Kinsey only authorized him to offer the Petitioner a job that allowed her to start after she delivered her baby, this evidence was not, in itself, direct evidence of discrimination on the part of Kinsey. *Id.* at 599 (slip op. 7-8). The court then considered additional circumstantial evidence presented by the Petitioner. *Id.* at 601-602 (slip op. 12-14). The Petitioner claims that when the court considered her circumstantial evidence, it ignored her claims that Kinsey had been trying to fill the position for months and had wanted to fill the position as soon as possible. (Pet., at 21-22). She argues that had the court done so, it would have found evidence of discriminatory intent.

In making this argument, the Petitioner herself is guilty of encouraging the court to use the very same piecemeal approach that she complains about. Her selective citation of the record completely ignores other facts relevant to the inquiry, including evidence that the Respondent rejected all other applicants for the position in the winter of 1999, and then stopped advertising for the position after Kinsey made the decision to hire the Petitioner. (Dkt. 10, Kinsey Dep. p. 46; Venturelli Dep. pp. 30-32, Complaint ¶ 13; Answer ¶ 13). The court expressly

acknowledged the latter piece of evidence in the decision. *Venturelli,* 350 F.3d at 603 (slip op. 16). In light of these facts, it is no wonder that the court did not give weight to the Petitioner's proffered evidence. Indeed, if all of the pertinent evidence is considered, the totality of the evidence actually undermines the Petitioner's argument that there was direct evidence of discrimination as to Kinsey.

After finding no direct evidence of discriminatory intent as to Kinsey, the court evaluated whether there was direct evidence of discrimination on the part of Baldwin. The Petitioner argued to the court that Baldwin told her that the Respondent was going to wait until after her pregnancy to hire her. (Pet., at 8-9). There is no dispute that the court considered both the direct and circumstantial evidence proffered by the Petitioner. *Id.* Even after doing so, the court was unable to find any direct evidence of discriminatory intent on the part of Baldwin. *Id.* The Petitioner merely disagrees with the court's treatment of the evidence. However, on summary judgment, the court is not required to draw any and all inferences in favor of the Petitioner, it is only required to draw reasonable ones. *See, e.g., Gleason v. Mesirow Fin., Inc.*, 118 F.3d 1134, 1139 (7th Cir. 1997). The court found that it could not draw the inferences urged by the Petitioner because her own evidence negated her theory. (Pet., at 8-9, n.2). This Court should not accept review of this case because there is no evidence that the Seventh Circuit failed to consider the totality of the evidence in deciding Respondent's summary judgment motion.[7]

---

[7] The Petitioner also cites to *Chuang v. University of California Davis*, 225 F.3d 1115, 1128 (9th Cir. 2000) to suggest that there is a conflict between the Seventh and Ninth Circuits with regard to the amount of direct evidence required to establish discriminatory intent under the direct method of proof. (Pet., at 23-24). She states that the

(Continued on following page)

III. THE SEVENTH CIRCUIT APPLIED THE PROPER TEST TO THE PETITIONER'S PRIMA FACIE CASE UNDER THE INDIRECT METHOD OF PROOF.

The third argument raised in the Petition relates to the Seventh Circuit's treatment of the Petitioner's prima facie case under the indirect method of proof. The Petitioner argues that the court applied a "new" prima facie standard to her discrimination case. (Pet., 24-27). However, a closer examination of the *Venturelli* decision demonstrates that the court understood its mission in analyzing the Petitioner's prima facie case. The court's later use of the word "because of her pregnancy" in connection to the third element of the prima facie case standard was merely semantical.

In the Seventh Circuit, the Respondent argued that the Petitioner failed to meet the third element of her prima facie case because she was offered a job with the Respondent. *Venturelli,* 350 F.3d at 602 (slip op. 14-17). In contrast, the Petitioner argued that this was not really a job offer because it did not permit her to begin working on a permanent basis prior to delivering her baby. *Id.* at 602-603. Although the court could not deny that there was a job offer on the table, albeit for sometime in the future, it nonetheless addressed the Petitioner's convoluted argument that the job offer was not really a job offer. *Id.*

Ninth Circuit requires "very little" direct evidence, while the Seventh Circuit requires "nothing less than an admission of discrimination." *Id.* The Petitioner misstates the Seventh Circuit's standard. In addition to permitting plaintiffs to submit obvious admissions of discrimination, the court also will consider "bits of evidence that lend circumstantial support to inferences of discrimination." *Venturelli*, 350 F.3d at 601 (slip op. at 11). It is difficult to understand how the two standards conflict.

In the first sentence of its analysis, the court properly stated the standard for the Petitioner's prima facie case:

> [Petitioner] must show that: (1) she was pregnant; (2) she applied and was qualified for the position sought; (3) she was rejected; and (4) the position remained open and ARC continued to seek applicants from persons of Venturelli's qualifications. . . . An alternate means of proving prong four is to establish that someone who was not pregnant received more favorable treatment. (internal citations omitted).

Id. at 602 (slip op. at 14). Upon review of the record, the court was unable to conclude whether the Respondent would or would not have offered the position to the Petitioner while she was still pregnant. The court's use of the language "because of her pregnancy" was nothing more than a less than artful way of explaining that the Petitioner had failed to establish her own argument that she was not offered the job while she was pregnant. It is clear that the court did not impose a heavier burden on the Petitioner.

In any event, even if the Court finds that the Seventh Circuit misstated the prima facie standard here, there is still no compelling reason for the court to accept review of this case. The "because of her pregnancy" language used by the court in evaluating the third prong of the prima facie standard is "superfluous to the correct test." *See, e.g., Johnson v. Wolff's Clothiers, Inc.*, 663 F.2d 800, 803 (8th Cir. 1981). It is merely a "restatement of the ultimate result of the test if the first four elements are established." *Id.* Thus, the "semantical error" does not warrant certiorari review of this case. *Id.* Also, the court's alleged misstatement of the test would amount to nothing more than harmless error, not necessitating a different result in this case, as the court also found that the Petitioner failed to establish the fourth element of her prima facie case.

Furthermore, the court did not impose a heavier burden on the Petitioner because it made a passing reference to her failure to approach Kinsey about the alleged comments made by Baldwin and Collins. (Pet., 25-26). Again, this all tied into Petitioner's argument that there was effectively no job offer because the Respondent would only allow her to begin the job after she was no longer pregnant. The court noted that the record might have been clearer on this issue had there been more evidence on the decisionmaker's state of mind. Thus, the court was only stating that had the Peititioner talked to Kinsey, the decisionmaker, it may have illuminated whether she had any discriminatory intent. The court was not articulating a "new" prima facie standard in this case.

IV. THE PDA DOES NOT REQUIRE PREFERENTIAL TREATMENT FOR PREGNANT WOMEN, ONLY EQUAL TREATMENT.

Petitioner's final diatribe focuses on the Seventh Circuit's conclusion that a job offer that permits a pregnant woman to begin a position sometime in the future does not, in itself, prove a violation of the Pregnancy Discrimination Act (the "PDA"). (Pet. 27-29). The Petitioner's argument on this issue exemplifies her gross misunderstanding of the PDA, and demonstrates that there is no compelling reason for the Supreme Court to review this case.

The PDA is not an accommodations statute. It does not require employers to treat pregnant women better than other prospective or current employees. *See* 42 U.S.C. § 2000e(k). The PDA only requires employers to treat pregnant employees the same as similarly situated employees. *Id.* The Petitioner is dismissive of this reality, although it is painstakingly clear from the plain language and legislative history of the PDA.

In 1974 and 1976, the United States Supreme Court issued two decisions that served as the catalyst for Congress to change how pregnancy is treated under Title VII. The first case, *Geduldig v. Aiello*, 417 U.S. 484 (1974), concluded that a state disability insurance program which denied benefits for normal pregnancy did not violate the equal protection clause of the Fourteenth Amendment of the U.S. Constitution. The Supreme Court found that the program did not treat men and women differently, but rather distinguished between pregnant and nonpregnant persons. *Geduldig,* 417 U.S. at 496 n.20. In 1976, the Supreme Court expanded its holding in *Geduldig* to apply to Title VII. *See General Elec. Co. v. Gilbert,* 429 U.S. 125 (1976) (holding that disability insurance plans that excluded coverage for pregnancy and related conditions did not constitute sex discrimination under Title VII).

Within two years of the Supreme Court's decision in *Gilbert,* Congress enacted the PDA, which reads as follows:

> The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work. . . .

Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified as amended at 42 U.S.C. § 2000e(k)). The plain language of the PDA requires employers to ignore an employee's pregnancy, but not her absence from work, unless the employer ignores the same for similarly situated nonpregnant employees. *See Troupe v. May Dept. Stores Co.,* 20 F.3d 734, 738 (7th Cir. 1994) (citing *Maganuco v. Leyden*

Community High School Dist. 212, 939 F.2d 440, 445 (7th Cir. 1991)).

Statements in the legislative history support this conclusion, and "make it clear that the PDA does not require employers to extend any benefit to pregnant women that they do not already provide to other disabled employees." *Armstrong v. Flowers Hosp., Inc.*, 33 F.3d 1308, 1317 (11th Cir. 1994). Various sponsors of the PDA tried to temper any overly expansive reading of the PDA by emphasizing that it only required employers to treat pregnancy the same as other disabilities. S. Rep. No. 95-331, at 4 (1977). These comments were offered on the issue during the Congressional debate on the PDA:

> The bill, because it would operate as part of Title VII, prohibits only discriminatory treatment. Therefore, the bill does not require employers to treat pregnant women in any particular manner with respect to hiring, permitting them to continue working, providing sick leave, furnishing medical and hospital benefits, providing disability benefits or any other matter. . . .
>
> This bill makes it clear that an employer must . . . provide benefits on an equal basis, if he does so at all. It does not, however, require that an employer do anything more for his pregnant employees than he does for any other employees.

S. Rep. No. 95-331, at 4 (1977). Even critics of the PDA base their complaints on the concession that the language of the PDA "does not require employers to recognize women's caregiving responsibilities beyond the immediate,

physical events of pregnancy and childbirth."[8] See e.g., Laura T. Kessler, *The Attachment Gap: Employment Discrimination Law, Women's Cultural Caregiving, and the Limits of Economic and Liberal Legal Theory*, 34 U. Mich. J.L. Ref. 371, 374, 398 (2001) (Also acknowledging that "courts addressing similar situations have uniformly held that needs or conditions of a child that require a mother's presence are not within the scope of the PDA." *Id.* at 399.).

The PDA does not, as she suggests, require an employer to ignore a woman's impending pregnancy leave. This is the exact same principle embraced by the Seventh Circuit in *Venturelli*. Because the Seventh Circuit's decision does not conflict with the PDA, the court need not grant review to review this issue.

---

[8] The federal Family and Medical Leave Act of 1993, 29 U.S.C. § 2601, et seq. ("FMLA") and similar state laws generally guarantee a woman's right to take maternity leave and to be reinstated to her former position thereafter. The FMLA's protections apply only to employees who have already demonstrated a loyalty to the employer, by having been employed by the employer for at least 12 months and having worked at least 1250 hours in the previous 12 months. 29 U.S.C. § 2611. However, because Petitioner was a new employee, the FMLA is not at issue in this case.

CONCLUSION

Based on the foregoing, the Petitioner's request for review should be denied.

Respectfully submitted this 1st day of April, 2004.

Attorneys for the Respondent,
ARC Community Services, Inc.

AMY O. BRUCHS
Counsel of Record
NIA ENEMUOH-TRAMMELL
MICHAEL BEST & FRIEDRICH LLP
1 S. Pinckney Street
P.O. Box 1806
Madison, Wisconsin 53701-1806
(608) 257-3501